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AL SIRAJIYYAH:

OR,

THE MAHOMEDAN LAW

OF

INHERITANCE,

WITH

A COMMENTARY,

By SIR WILLIAM JONES.

MDCCXCII.

A NEW EDITION,

WITH IMPROVEMENTS,

By SHAMACHURN SIRCAR.

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REMARKS BY THE EDITOR.

THE *Sirájiyyah*, the translation whereof is contained in the following pages, is the most celebrated treatise on the *Mahomedan* law of inheritance, though unfortunately it is both brief and abstruse, so much so that forty commentaries have been written to unfold and illustrate its meaning. Indeed, without the aid of a commentary, or living teacher, it can with difficulty be understood even by Arabic scholars. It is not therefore a matter of surprise that its translation by Sir William Jones is considered to be somewhat abstruse, though perhaps he was the only person equal to the task, and what he has done could not be expected from any one else. He only who has read the *Sirájiyyah* in Arabic can imagine what pains must have been taken and how much time bestowed by that eminent scholar to render it in intelligible Engish, and appreciate the justice of the following observation of his :—"But when it is admitted that the desire of extreme brevity has often made the *Sirájiyyah* obscure, the reader should in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system which he unfolds to his countrymen has no resemblance to any other that the world ever knew." The Editor has devoted much time to the study of the Arabic and some works on law written in that language, and believed, when he read the *Sirájiyyah*, that certain parts of it could not be intelligibly translated into English ; but when he looked into Sir William's translation of those passages, he was satisfied that nothing could be better. True in a very few places the translation does not agree with its text as appended to the book ; for instance, the cor-

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text as appended to the book. For instance the correct translation of the passage—"*O lau taraka abà al-muatiki o ibnahu, sudusulbalâe lil-abi, ol-bákí lel-ibni, o inda humá kulluhu lel-ibni,*" (page 7 of the Arabic part) is: "And if he (the freedman) leave the father and son of his manumittor, then a sixth of the property of the freedman vests in the father, and the residue in the son: and according to both, the whole of it (is) for the son." but the passage in question has been somewhat differently rendered by the learned translator, which is as follows: "If the freed man leave the father and son of his manumittor, then a sixth of the right over the property of the freedman vests in the father, and the residue in the son according to *Abú Yúsuf*; but according to both *Abú Hanífah* and *Mahammed*, the whole right vests in the son." The statement in that passage as given by Sir William is neverthless correct,—the two different opinions of the three lawyers expressed in his translation being well known to the *mooftees*, and the Arabic text, as contained in the other Editions of the *Sirajiyyah*, precisely corresponding with the above.* In other places where the translation did not agree with the text thereunto appended, I collated it with the other editions of the text, and generally found the translation correct.—From this it appears that the learned Translator must have carefully made his translation from a very correct copy, but the text appended to it has here and there been misprinted.

Of the forty commentaries on the *Sirajiyyah*, that which is styled *the Sharífiah* (after the name of its writer *Sharíf*) is considered to be the best.—Our learned Translator has made an abstract translation of this celebrated commentary, and therein introduced such illustrations only as appeared to

* See the last Edition of the *Sirajiyyah*, by Mouluvee Kubeeruddeen *Mahommed*, page 44.—Baillie's Edition, page 43, § 257, and also the other Editions.

him (throughly acquainted as he was with the text) necessary to facilitate the understanding of it. Here however I join Mr. Baillie in observing that, if the abstract translation of that commentary, for which we are indebted to sir William Jones, had been more copious, nothing further would have been requisite to give the English reader a complete view of the excellent system of inheritance. Add to this, even this short commentary was very inconveniently printed by him altogether as a separate book, without indicating by marks or figures the connection with the text translated. This indeed often puzzled the reader and caused a waste of time to find out what particular part of the commentary referred to a particular text. To save the reader this trouble, I have carefully inserted under each portion of the text the commentary relating to the same, and put one and the same figure at the end of a text and at the beginning of its commentary to indicate the connection with each other.

It is a matter of regret that this book, which to the *mahomedans* of India is of paramount authority on the law of inheritance is scarcely referred to in the courts of judicature, though it diserves to be consulted in preference as being the safest guide and the best test of accuracy of the other works on the same subject. Apprehending, however, the scarcity of the book to be the principal cause of its disuse, I publish this new edition of it, and earnestly recommed its use in the words of that eminent Judge, Sir William Jones :—"I am strongly disposed to believe, that no possible question could occur on the *Mahomedan* law of succession, which might not be rapidly and correctly answered by the help of this work."

AL SIRÁJIYYAH

OR,

THE MOHAMMEDAN LAW

OF

INHERITANCE,

WITH

A COMMENTARY

BY SIR WILLIAM JONES.

The two *Muselman* authors, whom I now introduce to my countrymen in *India*, are *Shaikh Sirájuddín*, a native of *Sejavend*, and *Sayyad Sharíf*, who was born at *Zurján* in *Khwárezn* near the mouth of the *Oxus*, and is said to have died, at the age of seventy-six years, in the city of *Shíráz*. Their compositions have equal authority in the *Mohammedan* courts, which follow the system of *Abú Hanífah*, with those of *Littleton* and *Coke* in the courts at *Westminster*; and there is, indeed, a wonderful analogy between the works of the old *Arabian* and *English* lawyers, and between those of their several commentators; with this difference in favour of our own country, that *Littleton* is always too clear to need a gloss, and with this difference in favour of the *Arabs*, that the sole object of *sharíf* was to explain and illustrate his text, without an ostentations display of his own erudition; but, when it is admitted, that a desire of extreme brevity has often made the *Sirájyyah* obscure, the reader should in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system, which he unfolds to his countrymen, has no resemblance to any other, that the world ever knew. In the *Sharífiyyah* (for that is the popular title of the *Arabian* comment) we find little or no obscurity; and, if there be a fault in the book, it is a scrupulous minuteness of explanation, and a needless anxiety to remove every little cloud, which the reader himself might disperse by the slightest exertion of his intellect. Both works were traslated into *Persian* by the order of *Mr. Hastings*; and the translation, which bears the name of *Maulaví Muhammed Kásim*, must appear

to the *Arabic* originals; but the text and comment are blended without any discrimination, and both are so intermixed with the notes of the translator himself, that it is often impossible to separate what is fixed law from what is merely his own opinion: he has also erred (though it be certainly a pardonable error) on the side of clearness, and has made his work so tediously perspicuous, that it fills, inclusively of a turgid and flowery dedication, about six hundred pages, and a faithful version of it in *English* would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as possible, be measured by the size of it, they must be thought very inconsiderable; but in truth no greater pains could have been taken with any work; and it would have been a far easier task to have dictated or written a verbal translation of the two comments on my text, than to have made a careful selection of all that is important in them; for which purpose I perused each of them three times with the utmost attention, and have condensed in little more than fifty short pages the substance of them both, without any superfluous passage, that I should wish to be retrenched, and with as much perspicuity as I was able to give, in so short a compass, to a system in some parts rather abstruse. Lest men of business, for whom the book is intended, should be alarmed at first sight by the magnitude of it, I have omitted all the minute criticism, various readings, and curious *Arabian* literature; most of the anecdotes concerning old lawyers, and all their subtile controversies with the arguments on both sides; together with the demonstrations of arithmetical rules and the very long processes, after the prolix method of the *Arabs*, in words instead of figures. Practical utility being my ultimate object in this work, I had nothing to do with literary curiosities, how agreeable soever they might have been in their proper places; but, in order to attain that object by a full explanation of every thing useful in my text,

I was under a necessity of retaining the *Arabian* phraseology both in law and arithmetic, and must request the *English* reader to dismiss from his mind, while he studies the *Sirájiyyah*, those appropriated senses, in which many of our words, *as heir, inheritance, root,* and the like, are used in our own systems. One *Arabic* word I was at a loss to translate precisely in our language without circumlocution: the chief problem, in the distribution of estates among *Muselman* heirs, is *to find the least number by which an estate must be divided, so that all the shares and the residue may be legally distributed without a fraction*: this they call *integration*; but, if I could have hazarded such a word in *English*, the frequent repetition of it would have been extremely harsh; and I have generally called it *arrangement* or *verification*, which are popular senses of the *Arabic* verbal noun; but the number sought, or, to use the *Arabian* expression, *the integrant of the case*, I have usually named the *divisor* of the estate.

It will be seen in the *Sirájiyyah*, that the system of *Zaed*, though in part exploded by *Abú Hanífah*, had very powerful supporters, and its author is always mentioned in terms of respect. It is the system, which I published at London above ten years ago; and I am not surprised, that, without a native assistant or even a marginal gloss, I could not then interpret the many technical words, which no dictionary explains, except in their popular senses; but, though my literal version of the tract by *Almutakanna*, seems for pages together like a string of enigmas, yet the following work makes every sentence in it perfectly clear; and the original, which was engraved from a very old manuscript, appears to be a lively and elegant epitome of the law of inheritance according to *Zaed*, but manifestly designed to assist the memory of young students, who are to get it by heart, when they had learned the rules from some longer treatise, or from the mouths of their preceptors. This may be no improper place to inform

the reader, that, although *Abú Hanífah* be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown to *Abú Yusuf* and the lawyer *Muhammed*, that, when they both dissent from their master, the *Muselman* judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason and founded on the better authority.

I am strongly disposed to believe, that no possible question could occur on the Muhammedan law of succession, which might not be rapidly and correctly answered by the help of the work; but it would be easy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if necessary, represent each of the sharers, residuaries, and distant heirs; and let those letters be the initials of the several words, in aid of the memory, but so chosen (as without difficulty they may be) that all may be different; let them be placed in alphabetical order, and connected by the sign of addition; let an enumeration be then made, by the known rule, of all the possible cases, in which they can occur, two and two, three and three, and so forth; let them accordingly be arranged in tables from the lowest number to the highest; and let the share or allotment of each be set above the letter, in the place of an exponent. If the question then were proposed, in what manner the property of *Hinda* must be distributed among her *daughter*, her *sister by the same father only*, and the *daughter of her son*, the table of the *third* class would exhibit this formula $D^{\frac{3}{6}}+DF^{\frac{2}{6}}+DS^{\frac{1}{6}}$; or, if *Amru* had left his *wife*, *two daughters*, and *both his parents*, the formula in the *fourth* table would be $2\ D^{\frac{16}{27}}+F^{\frac{4}{27}}+M^{\frac{4}{27}}+W^{\frac{3}{27}}$; where the denominator of the index would be the *integrant, as the Arabs* call it, *of the case*, and the numerator would point out the several allotments. Thus might we construct a set of tables, mathematically accurate, in which the legal distribution, in every possible case, might

be seen in a moment without thought and even without learning; and such a blind facility, though not very consistent with the dignity of science, would certainly be convenient in practice. We might also arrange the whole in a synthetical method (of all the most luminous and satisfactory) by beginning with the *sentences* of the *Ḳorán*, as with indubitable axioms, followed by the genuine oral *maxims* of *Muhammed*; by subjoining the *points*, on which all the learned have at length agreed, and by concluding with *cases* deduced from those three sources of juridical knowledge, to which there should be constant references by numbers in the manner of geometricians. This method I propose to adopt in the Digest, from which I have separated the *Sirajiyyah*, because it seemed worthy of being exhibited entire, and may be considered as Institutes of *Arabian* Law on the important title, mentioned by the *British* legislature, of *inheritance and succession to lands, rents, and goods.*

Unless I am greatly deceived, the work, now presented to the public, decides the question, which has been started, *whether by the Mogul constitution, the sovereign be not the sole proprietor of all the land in his empire, which he or his predecessors have not granted to a subject and his heirs;* for nothing can be more certain, than that *land, rents*, and *goods* are, in the language of all *Muhammedan* lawyers, *property alike alienable and inheritable*; and so far is the sovereign from having any right of *property* in the goods or lands of his people, that even escheats are never appropriated to his use, but fall into a fund for the relief of the poor. *Sharíf* expressly mentions *fields* and *houses* as inheritable and alienable property: he says, that a *house*, on which there is a lien, shall not be sold to defray even funeral expenses; that, if a man dig a well *in his own field*, and another man perish by falling into it, he incurs no guilt; but if he had trespassed on *the field of another man*, and had been the *occasion* of death, he must

pay the price of blood; that *buildings* and *trees* pass by a sale of land, though not conversely; and he always expresses what we call *property* by an emphatical word implying *dominion*. Such *dominion*, says he, may be acquired by the act of *parties* as in the case of contracts. or, by the act of *law*, as in the case of descents; and, having observed, that *freedom is the civil existence and life of a man, but slavery, his death and annihilation*, he adds, *because freedom establishes his right of property, which chiefly distinguishes man from other animals and from things inanimate*; so that he would have considered *subjects without property (which*, as he says in another place, *comprises every thing that a man may sell or give, or leave for his heirs) as mere slaves without civil life*: yet *Sharíf* was beloved and rewarded by the very conqueror, from whom the imperial house of *Dehli* boasted of their descent. The *Korán* allots to certain kindred of the deceased specific shares of *what he left*, without a syllable in the book, that intimates a shade of distinction between realty and personalty; there is therefore no such distinction, for interpreters must make none, where the law has not distinguished. As to *Muhammed*, he says in positive words, *that if a man leave either property or rights, they go to his heirs*; and *sharíf* adds, *that an heir succeeds to his ancestor's estate with an absolute right of ownership, right of possession, and power of alienation*. Now I am fully persuaded, that no *Muselman* prince, in any age or country, would have harboured a thought of controverting these authorities. Had the doctrine lately broached been suggested to the ferocious, but politick and religious, *Omar*, he would in his best mood have asked his counsellor sternly, whether he imagined himself wiser than God and his Prophet, and, in one of his passionate sallies, would have spurned him as a blasphemer from his presence, had he been even his dearest friend or his ablest general: the placid and benevolent *Alí* would have given a harsh rebuke to such an adviser: and *Aurangzíb*

himself, the bloodiest of assassins and the most avaricious of men, would not have adopted and proclaimed such an opinion, whatever his courtiers and slaves might have said, in their zeal to aggrandize their master, to a foreign physician and philosopher, who too hastily believed them, and ascribed to such a system all the desolation, of which he had been a witness. Conquest could have made no differenee; for, either the law of the conquering nation was established in India, or that of the conquered was suffered to remain: if the first, the *Korán* and the *dicta* of *Muhammed* were fountains, too sacred to be violated, both of public and private law: if the second, there is an end of the debate; for the old *Hindus* most assuredly were absolute proprietors of their land, though they called their sovereigns Lords of the Earth; as they gave the title of Gods on Earth to their *Brahmens*, whom they punished, nevertheless, for *theft* with all due severity. Should it be urged, that, although an *Indian* prince may have no right, in his *executive* capacity, to the land of his subjects, yet, as the sole *legislative* power, he is above control; I answer firmly, that *Indian* princes never had, nor pretended to have, an unlimited legislative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of dispensing.

I am happy in an opportunity of advancing these arguments against a doctrine, which I think unjust, unfounded, and big with ruin; for, in the course of nine years, I have seen enough of these provinces and of their inhabitants, to be convinced, that, if we hope to make our government a blessing to them and a durable benefit to ourselves, we must realize our hope, not by wringing for the present the largest possible revenue from our *Asiatic* subjects, but by taking no more of their wealth than the public exigencies, and their own security, may actually require; not by diminishing the

interest, which landlords must naturally take in *their own soil*, but by augmenting it to the utmost, and giving them assurance that it will descend to their heirs: when their laws of property, which they literally hold *sacred*, shall in practice be secured to them; when the land-tax shall be so moderate, that they cannot have a colourable pretence to rack their tenants, and when they shall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergence, which may endanger all they possess; when either the performance of every legal contract shall be enforced, or a certain and adequate compensation be given for the breach of it; when no wrong shall remain unredressed, and when redress shall be obtained at little expense, and with all the speed that may be consistent with necessary deliberation; then will the population and resources of *Bengal* and *Behar* continually increase, and our nation will have the glory of conferring happiness on considerably more than *twenty-four* millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose firm attachment will secure the permanence of our dominion.

THE SERAJIYYAH

WITH

A COMMENTARY

THE INTRODUCTION.

In the name of the most merciful God!

Praise be to God, the Lord of all worlds; the praise of those who give Him thanks! And (His) blessing on the best of created beings, *Muhammed*, and his excellent family! The Prophet of God, (on whom be *His* blessing and peace!) said: "Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge."[1] Our

1. In our administration of justice to Mohammedans according to their own laws, it will be of no use to inquire what their legislator meant by declaring, that the laws of inheritance constituted one-half of juridical knowledge. If he intend any thing more than a strong assertion of its importance, he probably had in contemplation the two general modes of acquiring property, contracts and succession, or the agreement of parties and the operation of law; and this explanation of the phrase, which had occurred to me on my first perusal of it, is also suggested by *Sayyad Sharíf*, together with a more fanciful interpretation, which *Maulavi Kásim* has adopted, that, life and death being incident to our probationary state in this world, and the law of succession manifestly relating to the dead, it is properly opposed to all other laws, which prescribe the duties and ascertain the rights of the living. But we merely take notice of the sentence, that no part of the *Sirajiyyah* may be unexplained, and proceed to the four acts, which, on the decease of a Mohammedan, are to be successively performed by the magistrate, or under his authority.

learned in the law (to whom God be merciful!) say: "There belong to the property of a person deceased four successive duties (to be performed by the magistrate:) first, his funeral ceremony and burial, without superfluity of expense, yet without deficiency;[2] next, the discharge of his just debts from the whole of his remaining effects;[3] then, the payment

2. A regard to public decency and convenience, as well as to public religion and health, seems in all nations to require, that the bodies of deceased persons be removed out of sight, with all due speed and solemnity, at a moderate expense, to be defrayed, even before the payment of their just debts, out of the property left by them, on which no legal claim, from hypothecation or otherwise, had previously attached: but the *Muselman* lawyers, who admit, that the funeral charges must in the first place be defrayed, assign a very whimsical reason for such a priority; because, they say, *the winding sheet and other clothes of the dead are analogous to suitable apparel worn by the living, and consequently should not be liable to the claims of a creditor.* The *legal* expenses of burying a Mohammedan are very moderate, both in the *number* and *value* of the clothes, in which the deceased is to be wrapped: as more than *three* pieces of cloth for a man, or than *five* pieces for a woman, would be held a prodigal superfluity, and less than those, a niggardly deficiency, of expense; so, if the funeral clothes of *Amru* or *Hinda* were dearer than the vesture usually worn by them, when alive, it would be a culpable excess; and if cheaper, a blamable defect; but, if in fact they had been used to wear one sort of apparel on solemn festivals, another in visiting their friends, and a third, in their own houses, the value of their visiting dress must regulate that of their burial, and either extreme would be too prodigal or too parsimonious. Should their debts, indeed, cover the whole of their property, the *legal* expense of the funeral must be reduced to the *sufficient* expense, as it is called; that is, to *two* pieces of cloth for *Amru* and to *three* for *Hinda*: the names, dimensions, and uses of all the cloths used in funerals, both for men and for women, are enumerated in Persian by *Maulaví Kásim*, but it would be useless to mention them; and it seems only necessary to add, on this article, that, if deceased persons leave no property whatever, or none without a special lien on it, the funeral expenses must be paid by such of their relations, as would have been compellable by law to maintain them, when living; and if there be no such relations, by the public treasury, in which there is always an ample fund arising from forfeitures and escheats.

3 After the burial, all the just debts of the deceased must be paid out of his remaining assets, as far as they extend; and, if there be many creditors, they must be satisfied in equal proportion, except that *a debt of health*, to use the *Arabian* phrase, must be discharged before *a debt of sickness;* that is, a debt *contracted* or *ac-*

of his legacies out of a third of what remains after his debts are paid;[4] and, lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions, and to the assent of the Learned.[5] They begin with the persons entitled to shares, who are such as have each a specific share allotted to them in the book of Almighty God;[6] then they proceed to the residuary heirs by relation, and they are all such as take what remains of the inheritance, after those who are entitled to shares; and, if there be only residuaries, they take the whole property: next to residuaries for special cause, as the master of an enfranchised slave and

knowledged, while the party was of sound understanding and body, is preferred, when legally proved, to one *acknowledged* in sickness, but of which no other evidence is produced. A religious vow, or promise of a charitable donation, as an atonement for sin, constitutes a debt *in conscience* only; and the sum thus promised must be paid out of a third part of the assets, after the legal creditors have been satisfied, provided that it was bequeathed by will; but, if no will was made, the temporal estate shall not be charged with a mere debt of religion.

4. The legacies of a *Muselman*, to the prejudice of his heirs, must not exceed *a third part* of the property left by him, and remaining after the discharge of his debts: over a third of such residue he has absolute power; and his legatee shall receive it immediately, whether a specific thing, or certain sum of money, or only a fractional part of his estate was bequeathed. This is the opinion of *Sharíf;* though a distinction, which the text by no means implies, has been taken between a *determinate* and an *indeterminate* legacy.

5. We come now to the distribution of his estate, remaining after the payment of debts and legacies, among his *heirs*, (for so we may call them, although *real* and personal *property* are undistinguished in the laws of the *Arabs,*) according to certain rules derived from three sources, the *Korán*, the genuine system of oral traditions from the legislator, and those opinions in which the learned and orthodox have generally concurred. The order and proportions in which the property of *Amru* or *Hinda* must be distributed, constitute the principal subject of the work, which we have undertaken to explain.

6. The first class of *heirs* are they, who may be called *sharers*, because a certain *share* of the estate is expressly allotted to each of them in the *Korán*, and particularly in the *fourth* chapter of it.

his *male* residuary heirs.[7] Then they return to those entitled to shares according to their respective rights of consanguinity;[8] then to the more distant kindred;[9] then to the successor by contract;[10] then to him who was acknowledged as a kinsman through another, so as not to prove his consanguinity, provided the deceased persisted in that acknowledgment even till he died;[11] then to the person, to whom

7. Next come they, who may be distinguished by the name of *residuaries*, because they take the *residue* after the *shares* have been duly distributed; and they are of two sorts, residuaries by *consanguinity* and residuaries for *special cause*, the former of whom are preferred in the order of succession; the latter are the masters or mistresses of enfranchised slaves, or their *male* residuary heirs. If no *sharers* be living, the *residuaries* take the whole.

8. But, if there be sharers *by consanguinity* and no residuaries, a further portion of the inheritance *reverts* to them, though never to the widower or to the widow, while any heirs by blood are alive.

9. On failure of the two preceding classes, the distribution is made among those *next of kin*, who are neither *sharers* nor *residuaries*: they may be called the distant kindred.

10. Should none of the distant kindred be living and capable of inheriting, the estate goes (unless there be a widow or widower, who is first entitled to a *share*) to him, who may be called the *successor by contract;* and of that succession it is necessary to give an example. If *Amru*, a man of an unknown descent, say to *Zaed*: "Thou art my kinsman, and shalt be my successor after my death, *paying for me* any fine and ransom to which I may become liable," and *Zaed* accept the condition, it is a valid contract by the *Arabian* law; and if *Zaed* also be a man whose descent is unknown, and make the same proposal to *Amru*, who likewise accepts it, the contract is mutual and similar, and they are *successors by contract* reciprocally.

11. If no such agreement had been made, but if *Amru* in his life-time had acknowledged *Zaed*, a man of an unknown pedigree, to be his *brother* or his *uncle*, that is, to be related to him by his *father* or by his *grandfather*, though in truth he had no such relation, and the bare acknowledgment of *Amru* cannot be admitted as a proof of it, yet, if *Amru* die without retracting his declaration, *Zaed* is called *the acknowledged kinsman by a common ancestor*, and stands in the *fifth* class of successors, but takes the estate before the general devisee.

the whole property was left by will; and lastly to the public treasury.[12]

ON IMPEDIMENTS TO SUCCESSION.

Impediments to succession are four; I. servitude, whether it be perfect or imperfect;[1] II. homicide, whether punishable by retaliation, or expiable;[2]

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12. Last of all comes the person, to whom the deceased had left the whole of his property by a will duly made and proved; for, though the law secures to his heirs of the five preceding classes *two thirds* of his estate, yet it so far respects his dominion, while he lived, over his own property, and his *will* as to the disposal of it after his decease, that it will rather give effect to an intention not strictly conformable to law, (for the *Korán* seems to allow *pious bequests* only) than suffer his estate to escheat; which must be the consequence of his dying without a representative. All such escheats to the sovereign go towards a fund for charitable uses; and according to the system of *Zaed*, the son of *Thábit*, which has been shortly explained in a former publication, that fund, if it be *regularly established*, is entitled to the whole estate on failure of residuary heirs, without any *return* to the sharers, and to the entire exclusion of the *four* last classes; but this doctrine seems quite exploded.

I. Slavery, by the *Mohammedan* law, is either *perfect* and *absolute*, as when the slave and all that he can possess are wholly at the disposal of his master, or *imperfect* and *privileged*, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a female slave, who has borne a child to her master, is also *privileged*; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The *Arabian* custom of allowing a slave to cultivate a piece of land, or set up a trade, on his own account, so that he may work out his manumission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their proprietors.

2. Homicide is either *with malice prepense*, and punishable with *death*, or *without proof of malice*, and *expiable* by redeeming a *Muselman* slave, or by fasting two entire months, and by paying the price of blood; or, thirdly, it is *accidental*, for which an expiation is necessary. *Malicious homicide* or *murder* (for, by the best opinions, the *Arabian* law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous instrument likely to occasion

III. difference of religion;[3] and IV. difference of country, either actual, as between an alien enemy and an alien tributary; or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states: now a state differs from another by having different forces and sovereigns, there being no community of protection between them.[4]

death, as with a sharp stick or a large stone, or with fire, which has *the effect*, says *Kásim*, of *the most dangerous instrument*, and, by parity of reason, with *poison* or by *drowning;* but those two modes of killing are not specified by him; and there is a strange diversity of opinion concerning them. Killing *without proof of malice* is, where death ensues from a beating or blow with a slight wand, a thin whip, or a small pebble, or with any thing not ordinarily dangerous: *accidental death* is, when it was neither designed nor could have been prevented by ordinary care, as if *Amru* were to shoot an arrow at a wild beast, and the arrow by accident were to kill *Zaed*, or if *Mázin* were to fall from his terrace upon *Zuhaer* and kill him by his fall; in which cases the slayers would not be permitted to inherit *from the slain*. If, however, a man were to dig a pit. or fix a large stone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary *occasion* (but not the *cause*) of the death, must pay the price of blood, but would not, it seems, be generally disabled from inheriting: he ought, one would think, to be incapable of succeeding to the property of the deceased, whom he destroyed, and whom he might have meant to destroy, by such a machination.

3. An unbeliever shall never be heir to a believer, nor conversely, but infidel subjects may inherit from infidels.

4. The difference between two states or countries consists in the difference of sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them. This difference is particularly marked between a country governed by a *Mohammedan* power and a country ruled by a prince of *any other religion;* for they are always, virtually at least, in a state of warfare, the first being called by lawyers *the seat of peace*, and the second, *the seat of hostility*. A difference of country, therefore, which excludes from the right of inheriting, is either *actual* and *unqualified*, as when an *alien enemy* resides in the *seat of hostility*, or when an alien has chosen his domicil in the *seat of peace*, and pays the tribute exacted from infidels, in which case the *tributary* shall not be heir to the *alien enemy* dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is qualified, as when a *fugitive* enemy seeks quarter, and obtains a temporary residence in the *seat of*

OF THE DOCTRINE OF SHARES, AND THE PERONS ENTITLED TO THEM.

The *Furud* (*Furuz,*) or shares, appointed in the book of Almighty God, are six: a moiety, a quarter, an eighth, two-thirds, one-third, and a sixth, *some formed* by doubling, and *some* by halving.[1] Now those entitled to these shares are twelve persons; four males, who are the father and the true grandfather, or other male ancestor, how high soever *in the paternal line,* the brother by the same mother, and the husband;[2] and eight females, who are the wife, and the daughter, and the son's daughter, or other female descendant how low soever, the sister by one father and mother, the sister by the father's side, and the sister by the mother's side, the mother and the true grandmother, that is, she who is related to the

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peace, or when two alien enemies are fugitives from two different hostile countries: now, although the *tributary* and the *fugitive* actually live in the same kingdom, yet, since the fugitive continues a subject of the hostile power, he remains, *as it were,* under a different government, and there is no mutual right of succession between him and the tributary; nor, by similarity of reason, between *two fugitives,* who leave two distinct hostile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their constant abode.

1. If none of these four incapacities preclude the heirs of *Amru* from the legal succession to his estate, which we will suppose already sold and reduced to money of one denomination, the magistrate, or his officer, must proceed to the distribution of the *shares;* and, as they are a *moiety,* a *fourth.* an *eighth,* two *thirds,* one *third,* and a *sixth,* of the aggregate sum, it will be convenient at first to consider that sum as consisting of *twenty-four* equal parts, so that the shares will be, in whole numbers, *twelve, six, three, sixteen, eight,* and *four.*

2. The *sharers* are *twelve* persons, *four* males and *eight* females; but, before we specify their respective allotments, it is necessary to premise, that a *grandfather* and a *grandmother,* according to the *Arabian* idiom, signify a *male* and a *female ancestor* in any degree; that a *true* grandfather is he, between whom and the deceased no female ancestor intervened; that a *false* grandfather is, where the paternal line of ascent was broken by the intervention of a female; and that a grandmother also is called *true,* when no *false grandfather* intervened between her and the deceased: in short, the only *true line of ancestry,* according to the *Arabs,*

deceased without the intervention of a false grandfather. (A false male ancestor is, where a female ancestor intervenes in the line of ascent.) [3]

The father takes in three cases; I. an absolute share, which is a sixth, and that with the son, or son's son, how low soever; II. a legal share, and a residuary portion also; and that with a daughter, or a son's daughter, how low soever in the degree of descent; III. he has a simple residuary title, on failure of children and son's children, or other low descendants. The true grandfather has the same interest with the father, except in four cases which we will mention presently, if it please God; but the grandfather is excluded by the father, *if he be living;* since the father is the mean of consanguinity between the grandfather and the deceased. The mother's children also take in three cases: a sixth is the share of one only; a third, of two, or of more: males and females have an equal division and right; but the mother's children are excluded by children of the deceased and by son's children, how low soever, as well as by the father and grandfather; as the learned agree. The husband takes in two cases; half, on failure of children, and son's children; and a fourth, with children or son's children, how low soever they descend. [4]

is an uninterrupted succession of *paternal* forefathers. The *male* sharers then are the *father*, the *true grandfather*, *the brother by the same mother* only, and the *widower*.

3. The females are the *widow*, the *daughter*, the *female issue of the son*, the *sister of the whole blood*, the *sister by the same father* only, the *sister by the same mother* only, the *mother* herself, and the *true grandmother*.

4. We begin with the *males* in the order of the shares before enumerated; and, I. the father of *Amru* or *Hinda* takes a *sixth* absolutely, though a *son* of the deceased be living, or any male descendant, who claims wholly through males; but, if there be no such male descendant, he becomes a *residuary heir*; and, if there be only a *daughter* of the deceased, or a *female* descendant from the son, he first has his legal share, or a *sixth*, and, when her share also has been allotted, he claims the residue. II. The true grandfather is excluded from any share by the living father, *through whom* alone the grandfather bore a relation to the deceased;

and, although a similar reason might afterwards be applied to the mother, and operate to the exclusion of her children, yet the father has the additional strength of a double title, both as a *sharer* and as a *residuary*. but, if the father also be dead, *his* father, or true paternal ancestor, has exactly the same interest, except in four cases, which will be presently mentioned. III A single half brother, by the same mother only, takes a *sixth*, and two or more such half brothers, a *third*; provided that the deceased left neither children, nor male issue of a son, nor a father, nor a true grandfather; by any of whom the brothers by the same mother are excluded; and this article brings us necessarily to one class of *female* sharers; for *in this instance* there is no distinction of sex, both brothers and sisters by the same mother only having an equal right and an equal share in the distribution. IV. A moiety of *Hinda's* estate, if she die without children, or the issue of a deceased son, goes to her widower *Amru*, who, if she leave such issue, has no more than a *fourth*. As examples of the father's rights, let us suppose *Amru* to have died worth two thousand four hundred pieces of gold, leaving his father *Zaed*, and either a son or a son's son, *Omar*: in this case the four hundred pieces are the share of *Zaed*, and *Omar* takes the remaining two thousand; but if *Amru* leave only his father *Zaed* and either a daughter, or son's daughter, *Laela*, the father is first entitled to the *four hundred pieces*, or *sixth* part, and, after *Laela* has received *twelve* hundred, or a moiety of the estate, (which, as we shall see, is her *share* in this case,) he takes, as *residuary*, the *eight* hundred pieces which remain: so that the property of *Amru* is equally divided between them. Should no relation be left but *Zaed* the father, and *Lebíd* the brother, of the deceased, *Lebíd* is excluded; and the whole estate goes to *Zaed*. If, in the three preceding cases, the paternal grandfather *Sálim* had been left instead of *Zaed*, his rights would have been precisely the same, and the only difference between *Zaed* and *Sálim* will appear from the four following examples. I. The paternal grandmother would be excluded by *Zaed* her son, but not by his father, her husband, *Sálim* II If *Amru* or *Hinda* leave a father *Zaed*, a mother *Salma*, and a widow *Zaeneb*, or widower *Háreth*, the mother takes a *third* part of what remains after *Zaeneb* or *Háreth* has received the legal share, but if *Sálim* be substituted for *Zaed*, she would have a right to a third of the *whole assets*, according to the prevailing opinion, although *Abú Yúsuf* thought her entitled, even in that case, to no more than a third of *the remainder*. III. The brothers of the whole blood, and those by the same father only, are excluded from the inheritance by *Zaed* the father, but not by the grandfather *Sálim*, as the best lawyers agree, dissenting on this point from their master *Abú Hanífah*. IV. If *Amru* had manumitted his slave *Yásmín*, and died, leaving his father *Zaed* and a son *Omar*, a sixth part of the right of succession to *Yasmín* would have vested, according to *Abú Yúsuf*, in *Zaed*, but, if the

ON WOMEN.

Wives take in two cases; a fourth (goes) to one or more on failure of children and son's children, how low soever; and an eighth with children or son's children, in any degree of descent. Daughters begotten by the deceased take in three cases: half (goes) to one only, and two thirds to two or more; and, if there be a son, the male has the share of two females, and he makes them residuaries. The son's daughters are like the daughters begotten by the deceased; and they may be in six cases: half (goes) to one only, and two thirds to two or more, on failure of daughters begotten by the deceased; with a single daughter of the deceased, they have a sixth, completing, (with the daughter's half,) two thirds; but, with two daughters of the deceased, they have no share of the inheritance, unless there be, in an equal degree with, or in a lower degree than, them, a boy, who makes them residuaries. As to the remainder between them, the male has the portion of two females; and all of the son's daughters are excluded by the son himself.[5] If a man leave three sons' daughters,

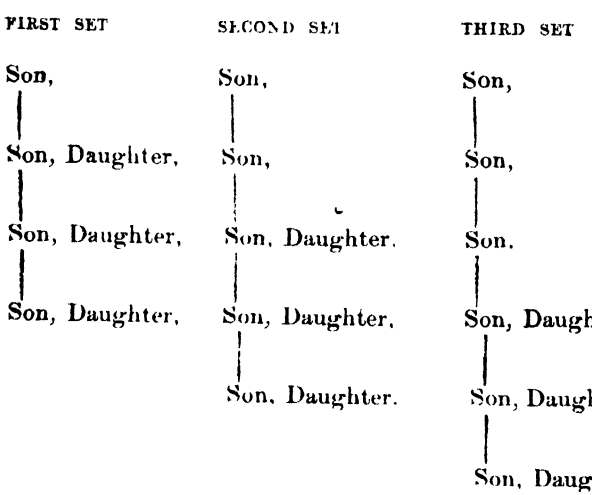
paternal grandfather *Sálim* had been left instead of the father, the whole interest would have vested in the son: in this case that illustrious lawyer ultimately dissented from his master and from his fellow student *Muhammed*, who were both very justly of opinion that, whether *Zaed* or *Sálim* were alive on the death of the manumittor, the whole right of succession to the manumittee vested in *Omar*.

5 Let us proceed to the shares of the *females*; and I. If *Amru* die without children, and without any issue of a deceased son, his widow *Hinda* must receive a *fourth* of his assets: but her share is an *eighth* only, if any such issue be living: should he leave more widows than one, they take equal parts of such *fourth* or *eighth*; so that the legal share of the widower is always in a double ratio to that of the widow or widows: as, if *Hinda* die worth *twenty four* thousand *Zecchins*, her surviving husband *Amru* must be entitled either to *twelve* or to *six* thousand; and if *Amru* die with the same estate, his widow *Hinda* must have either *six* or *three* thousand for her sole share; or, if *Zaeneb* and *Abla* had also been legally married to *Amru*, the three widows must receive either *two* or *one* thousand *Zecchins* each, as the case may happen. II. One *daughter* takes a moiety, and *two or more* daughters have *two thirds*, of their father's estate; but if the deceased

some of them in lower degrees than others, and three daughters of the son of another son, some of them in lower degrees than others, and three daughters of the son's son of another son, some of them in lower degrees than others, as in the following table, this is called the case of *tashbíh*.[6]

left a son, the rule, expressed in the *Korán*, is thus: "to one male give the portion of two females;" and the daughters in that case are not properly *sharers*, but *residuary heirs* with the son, their part of the inheritance being always in a subduple ratio to his part. Thus, if *Amru* die worth *twenty four* thousand pieces of gold, his only child *Fátima* takes twelve thousand as her *share*; but, if she have three sisters, *Azza*, *Latífa*, and *Zubaedá*, two thirds of the assets, or *sixteen* thousand pieces, are equally divided between the four girls; and, if there be a son *Omar*, he must receive, in the first case, *sixteen* thousand, while *Fátima* has eight; and, in the second, *eight* thousand, while she and her sisters take each *four* thousand, pieces. III. If *Omar* had died before his father, leaving female issue, and his father had then died without any daughter of his own, the daughters of *Omar* would have had precisely the same shares, to which those of *Amru* himself would have been entitled; but had *Fátima* been living, she would have taken *half* the estate, or *twelve* thousand pieces of gold, and a *sixth* only, or *four* thousand, the complement of *two thirds* or *sixteen* thousand, would have been equally distributed among her nieces. Had *Fátima* and *Azzá* been at that time alive, they would have taken their legal share, to the exclusion of their brother's female issue, unless the right of that issue had been sustained by *a male* in an *equal* or *a lower* degree, who would have made them residuaries," the male taking, by the rule, the portion of two females;" but a male in a *higher* degree would not have given them that advantage; and, if *Omar* himself had survived, his daughters would have been wholly excluded. The *six* cases, therefore, or different situations, of the female issue of *Omar* may be thus recapitulated. I. A single female takes a *moiety*. II. Two or more have *two-thirds*. III. *A male* in the same, or a lower, degree than themselves, gives them *a residuary* right in a subduple ratio to his own. IV. With a daughter of *Amru*, who is entitled to *half*, they would have only a *sixth*, to make up the regular share of the female issue. V. They are excluded, if *Amru* left more daughters than one, but no male issue in any equal, or a *lower*, degree. VI. A son also of *Amru* wholly excludes them. In the first three their legal claims correspond with those of daughters: but last three their rights are weaker, because they are in a degree from the deceased.

6. The pedigree exhibited in the text is called by the the *tashbíh*, because, in their opinion, it sharpens the understand-



Here the eldest of the first line has none equal in degree

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ing, and captivates the fancy as much as the *composition of an elegant love-poem*, which the word literally signifies; but without adopting so wild a metaphor, we may truly say, that it is very perspicuous, and that no comment, after what has been premised, could render it clearer. An example, however, will show more distinctly than an abstract rule, in what manner an estate is divisible, when a *male* descendant gives a *residuary* title to a female in the same, or in a *higher*, degree Call the only surviving male descendant *Omar*, and suppose him to be the brother of *Amína*, who stands lowest in the first set of females: here the highest female in that set must receive *a moiety* of the assets; the next below her takes a *sixth* together with the highest of the second set, as the complement of *two thirds*; and the *residue* is divided into *five* portions, of which *Omar* claims *two* and each of the females in the same degree, one; but the three females below them are excluded If *Omar* be the brother of *Zarífa*, whom we suppose the lowest of the middle set, the remaining *third* of the estate must be distributed in *sevenths*, because there are *five* females, *three* in a higher, and *two* in an equal, degree with *Omar*, who must always have a double portion; and, if he be the brother of *Unaeza*, the lowest female of the *third* set, (who, on the former supposition, would have been excluded,) there will be *six* female *residuaries* entitled to portions with *Omar*, but in a subduple ratio; so that, if *Amru* died worth *twenty-four* thousand ducats, the daughter of his son takes *twelve* thousand of them; the two daughters of his sons' sons receive each *two* thousand, and the residue being *eight*, *Omar* is entitled also to *two* thousand ducats, while *Unaeza* and the five women, who remain, have each one thousand, which they owe to the fortunate existence of *Omar*.

with her; the middle one of the first line is equalled in degree by the eldest of the second; and the youngest of the first line is equalled by the middle one of the second, and by the eldest of the third line; the youngest of the second line is equalled by the middle one of the third line, and the youngest of the third set has no equal in degree.—When thou hast comprehended this, then we say: the eldest of the first line has a moiety; the middle one of the first line has a sixth together with her equal in degree to make up two-thirds; and those in lower degrees never take any thing, unless there be a son with them, who makes them residuaries, both her who is equal to him in degree, and her who is above him; but who is not entitled to a share: those below him are excluded.

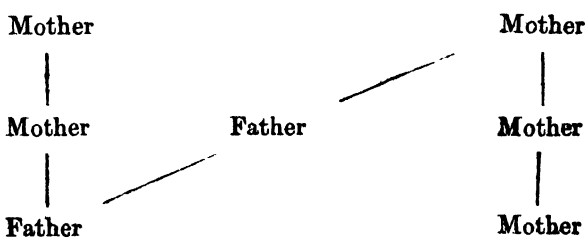
Sisters by the same father and mother may be in five cases: half (goes) to one alone; two-thirds to two or more; and, if there be brothers by the same father and mother, the male has the portion of two females; and the females become residuaries through him by reason of their equality in the degree of relation to the deceased; and they take the residue, when they are with daughters or with son's daughters, by the saying of Him, on whom be blessing and peace! "Make sisters, with daughters, residuaries." Sisters by the same father only are like sisters by the same father and mother, and may be in seven cases: half (goes) to one, and two-thirds to two or more on failure of sisters by the same father and mother; and, with one sister by the same father and mother, they have a sixth, as the complement of two-thirds; but they have no inheritance with two sisters by the same father and mother, unless there be with them a brother by the same father, who makes them residuaries; and then the residue is *distributed* among them *by the sacred rule* "to the male what is equal to the share of two females." The sixth case is, where they are residuaries

with daughters or with son's daughters, as we have before stated it.[7]

Brothers and sisters by the same father and mother, and by the same father only, are all excluded by the son and the son's son, in how low a degree soever, and by the father *also*, as it is agreed *among the learned*, and even by the grandfather according to *Abú Hanífa*, on whom be the mercy of *Almighty God!* And those of the half blood are also excluded by the brothers of the whole blood. The mother takes in three cases: a sixth with a child, or a son's child even in the lowest degree, or with two brothers and sisters or more, by which ever side they are related; and a third of the whole on failure of those just mentioned; and a third of the residue after the share of the husband or wife; and this in two cases, either when there are the husband and both parents, or the wife and both parents: if there be a grandfather instead of a father, then the mother takes a third of the whole property, though not by the opinion of *Abú Yusuf*, on whom

7. The rights of sisters by the same father and mother, and those of sisters by the same father only, are explained in the text with sufficient clearness; but it is proper to observe, that the *fifth* case of the *first* class is comprised in the *seventh* case of the second; and that the sisters by the same mother have been mentioned in a former section. There will be no use in repeating the ingenious arguments of *Ibnu Abbás* in support of his dissent on many points from other old lawyers, nor the solid answers which have been given to his objections; but a story, told by *Sharíf*, may here be repeated, because it conveys an idea of the traditionary *Arabian* law, and shows from what sources our excellent author derived his docne: '*Hudhail* used to relate, that *Abú Múusa*, being consulted on the distribution of an heritage among *a daughter*, a son's *daughter*, and a *sister*, answered, *the first must have a moiety; the second a sixth; and the third, what remains*; but "consult *Ibnu Masúud*, added he, and apprise me of his answer:" when *Ibnu Masúud* was consulted, he said, that he was present, when *Muhammed* himself gave the same decision; and, when that answer was reported to *Abú Músá*, he said, "you must put no questions to me, as long as that illustrious lawyer remains with you."

be God's mercy! for he says, that in this case also she has only a third of the residue.[8] The grandmother has a sixth, whether she be by the father or by the mother, whether alone or with more, if they be true grandmothers and equal in degree; but they are all excluded by the mother, and the paternal female ancestors also by the father; and, in like manner, by the grandfather, except the father's mother, even in the highest degree; for she takes with the grandfather, since she is not *related* through him. The nearest grandmother, or *female ancestor*, on either side, excludes the more distant grandmother, on whichever side she be; whether the nearer grandmother be entitled to a share of the inheritance, or be herself excluded. When a grandmother has but one relation, as the father's mother's mother, and another has two such relations, or more, as the mother's mother's mother, who is also the father's father's mother, according to this table:



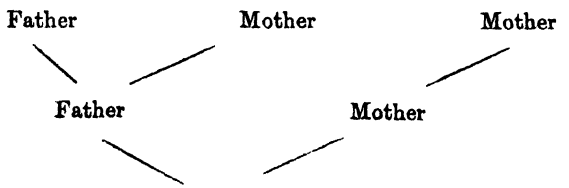
then a sixth is divided between them, according to *Abú Yusuf*, in moieties, respect being had to their persons; but, accord-

8. Although the different rights of the mother in different cases be very clearly explained, yet her title to a *third of the residue* may be illustrated by two examples: first, if *Adhra* leave only her husband *Wámik*, her mother *Sóáda*, and her father *Mázin*, half of her estate goes to *Wámik*, a third of the other half, or a sixth of the whole, to *Sóáda*, and the remainder to *Mázin*; but, secondly, if *Wámik* leave only his wife *Adhra*, his mother *Zaeneb* and his father *Lebíd*, the widow takes a quarter of his property, while *Zaeneb* has a third, and *Lebíd* two-thirds, of the remaining three quarters.

ing to *Muhammed,* (on whom be God's mercy!) in thirds, respect being had to the sides.[9]

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9. In giving an example of the division between two great grandmothers, we may anticipate in some degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by *Sharif,* is in this form :



Now the paternal grandmother's mother and the mother of the paternal grandfather are together entitled to a sixth, and the paternal grandfather's father to the residue, of the estate, which ought, by the general rule, to be divided into *six* parts, because six is the denominator of the share; but, to avoid a fraction, we must observe the proportion of *one*, or the sixth part, to *two*, or the number of persons entitled to it; and, since *one* and *two* are *prime* to each other, we must multiply *two* into *six*, and the product is the number of parts into which the property must be divided; so that of *twelve* cows or horses the great grandfather will have *ten*, and each of the great grandmothers, one. The great grandfathers are called ancestors in the *second*, and their fathers, ancestors in the *third*, degree, and so forth; and it must be remarked that in these tables the number of *female* ancestors. who inherit with the *males*, is equal to the number of such degrees: thus in the following .

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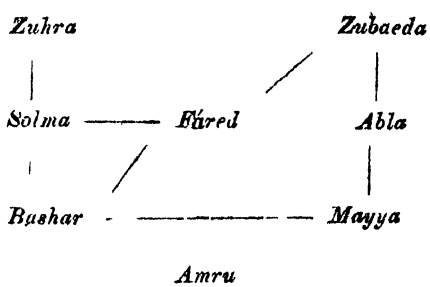
there are *three* great great grandmothers, and the estate must be divided into *eighteen* parts, because one and three are prime to each other. We suppose, in both pedigrees, that the highest line only are left by the deceased *Amru ;* for, by the text, *the nearest*

ON RESIDUARIES.

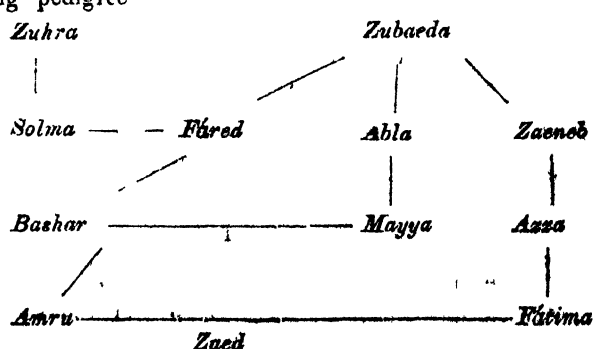
Residuaries by relation *to the deceased* are three: the residuary in his own right, the residuary in another's right,

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female ancestor excludes the more distant; and, if he leave his father *Zuhaer*, and his paternal grandmother *Azza*, with *Laelá* his maternal grandmother's mother, *Zuhaer* takes the whole inheritance; for he excludes *Azza*, and she, being nearer in degree, excludes *Laelá*. Let us conclude the subject with a case put by *Sharíf* in illustration of the pedigree in the text: *Zubaeda* gave her daughter's daughter *Mayya* in marriage to her son's son *Bashar*, and the young pair had a son *Amru*, who acquired an estate, and died: now *Zubaeda* was both paternal and maternal great grandmother of *Amru*, and had, therefore, *a double* relation to him, but another woman, named *Zuhra*, had married her daughter *Solma* to *Fáred*, who was the son of *Zubaeda*, brother of *Abla*, and father of *Bashar;* so that *Zuhra* was *Amru's* paternal grandmother's mother, and had only a single relation; as it will appear by the following arrangement of the family:



The case of a triple relation will be no less evident from the following pedigree



and the residuary together with another. Now the residuary in his own right is every male, in whose line of relation to the deceased no female enters; and of this sort there are four classes; the offspring of the deceased, and his root; and the offspring of his father and of his nearest grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceased are his sons *first;* then their sons, in how low a degree soever: then *comes* his root, or his father; then his paternal grandfather, and their paternal grandfathers, how high soever; then the offspring of his father, or his brothers; then their sons, how low soever; and then the offspring of his grandfather, or his uncles: then their sons, how low soever. Then the strength of consanguinity prevails: I mean, he, who has two relations is preferable to him, who has only one relation, whether it be male or female, according to the saying of Him, (on whom be peace!) "surely, kinsmen by the same father and mother shall inherit before kinsmen by the same father only:" thus a brother by the same father and mother is preferred to a brother by the father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the father

For, if *Amru*, whom in the former case we supposed to be dead whithout issue, had lived and married his cousin *Fátima*, by whom he had a son *Zaed*, who died leaving property, *Zubaeda* would have a *triple* relation to the deceased; first, as his maternal great grandmother's grandmother; secondly, as his paternal grandmother's grandmother; and thirdly, as the mother of his paternal great grandfather; but *Zuhra* has only a *single* relation to *Zaed*, as grandmother of his paternal grandfather *Bashar*.

In both these cases a *sixth* of the assets is divided *equally* between the *two* female ancestors, by the opinion of *Abú Yusuf*, and, according to one authority, by that of his great master also; but his fellow student *Muhammed* (whose arguments, and the answers to them, it is needless to add) contended, that *Zubaéda* would be entitled in the first case to *two thirds*, and, in the second, to *three fourths*, of that *sixth* part, according to the number of modes in which she was related to *Amru* or *Zaed*.

only; and the son of a brother by the same father and mother is preferred to the son of a brother by the same father only; and the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The residuaries in another's right are four females; namely, those whose shares are half and two thirds, and who become residuaries in right of their brothers, as we have before mentioned in their different cases; but she, who has no share among females, and whose brother is the heir, doth not become a residuary in his right; as in the case of a paternal uncle and a paternal aunt.[13]

As to residuaries together with others: such is every female who becomes a residuary with another female; as a sister with a daughter, as we have mentioned before.

The last residuary is the master of a freedman, and then his residuary heirs, in the order before stated; according to the saying of Him, (on whom be blessing and peace!) "The master bears a relation like that of consanguinity;" but females have nothing among the heirs of a manumittor, according to the saying of Him, (on whom be blessing and peace!) "Women have nothing from their relation to freedmen, except when they have themselves manumitted a slave; or their freedman has manumitted one, or they have sold a manumission to a slave, or their vendee has sold it to his slave, or they have promised manumission after their death, or their promisee has promised it after his death, or unless their freedman or freedman's freedman draw a relation *to them.*"

If the freedman leave the father and son of his manumittor, then a sixth of the right over the property of the freedman vests in the father, and the residue in the son, according to *Abú Yusuf;* but, according to both *Abú Hanífah* and *Muhammed,* the whole right vests in the son; and, if a son and a

grandfather of the manumittor be left, the whole right over the freedman goes to the son, as all the learned agree. When a man possesses as his slave a kinsman in a prohibited degree, he manumits him, and his right vests in him; as if there be three daughters, the youngest of whom has twenty *dínárs*, and the eldest, thirty; and they two buy their father for fifty *dínárs*; and afterwards their father die leaving some property; then two-thirds of it are divided in thirds among them, as their legal shares, and the residue goes in fifths to the two who bought their father; three-fifths to the eldest and two-fifths to the youngest; which may be settled by dividing the whole into forty-five parts.[10]

10. No comment could add perspicuity to the chapter on *residuary heirs*, until we come to the cases of inheritance from enfranchised slaves, where a short elucidation of the text appears necessary. If *Amru* enfranchise *Nergis*, and die, leaving a son *Becr*, and a daughter *Laelá*; then, on the death of *Nergis* without *residuary* heirs by blood, his property goes wholly to *Becr*, and *Laelá*, by the traditionary rule, takes nothing; but, suppose *Laelá* herself to manumit her black slave *Súsen*, who then purchases a slave *Misc*, and gives him freedom; and suppose *Súsen* first, and *Misc* afterwards, to die without residuary heirs, in this case the estate of *Misc* goes to *Laelá*; nor would there be any difference, if the two manumissions had been conditioned to pay a certain sum of money at a certain time. The case of a manumission promised on the death of the mistress, has rather more difficulty; but an example will make it clear: *Laelá* promises *Nergis*, that, on her death, he shall be free; but, by the persuasion of a Christian friend, she renounces her faith, and seeks refuge in a hostile country: now *a believer cannot be the slave of an infidel*; and the *Mohammedan* judge pronounces accordingly, that *Nergis* has gained his freedom; but *Laelá*, repenting of her apostasy, returns to her native country and her former belief; after which *Nergis* dies without heirs: *Laelá* succeeds as residuary to her promisee, as she would have succeeded to a slave of *Nergis* purchased after the decision of the judge, if a similar promise of manumission at his death had been made by the master; and if that second promisee had died without heirs after her repentance and return. Should *Káfúr*, a slave of *Laelá*, marry, with her consent, *Merjáná*, the freedwoman of *Amru*, the son of that couple would be born free, because, in respect of freedom or slavery, a *child has the condition of its mother*, and he bears a relation to *Amru* her manumittor; but, should *Laelá* give *Káfúr* his freedom, he would *draw* that relation from *Amru*, through himself, to *Laelá*, so that she would

ON EXCLUSION.

Exclusion is of two sorts: 1. *Imperfect*, or an exclusion from one share, and an admission to another; and this takes place

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succeed to the son of *Káfúr* and *Merjá'á*, if he died after his parents and without other heirs of the first or second class: the case would be similar, if *Káfúr*, being enfranchised, had bought a slave *Misc*, and given him in marriage to the freedwoman of *Zaed*, for, if the issue of that marriage had been a son, born free, but with a relation to *Zaed*, and if *Káfúr* had then given *Misc* his liberty, he would have *drawn* from *Zaed* the relation of his freedman's child, and transferred it, though himself, to *Laelá* his former mistress. This doctrine of a *relation* (as the Arabs call it) first *vested* through the mother, and then *divested* through the father, is founded on a decision of *Othman* in the case of *Zuhaer* and *Rafi*.

We had occasion before, to mention the difference (according to *Abú Yusuf*) between the *father* and the *grandfather* of the manumittor, in regard to their succession, with his *son*, to the property of a freedman; nor can any thing of moment be added here; but it will be proper to explain at large the concluding case in the chapter of *residuaries*, which proves, that the relation of enfranchisement may arise by the *act of law* as well as by the *act of the party*. Let it be premised, that marriage is prohibited between kindred of two classes; first, between all those in ascending or descending lines of consanguinity, who are called *near*; secondly, between brothers and sisters, and their issue, or between nephews or nieces and aunts or uncles, paternal or maternal, who are called *intermediate*; but, between those of the third, or *distant*, class, as the first or other cousins, there is no prohibition: now, if *Amru* or *Hinda* purchase a kinswoman or kinsman within either of the *prohibited* degrees, the slave becomes instantly free, and a right of succession vests in the purchaser, though the mastership began and ended in one moment. Call the three daughters of *Háreth* a slave, *Zubaeda*, *Sáfiya*, *Amína*, who derived freedom from their mother, and two of whom, the first and third, purchase *Háreth* for fifty pieces of gold: he becomes in that instant free; and, if he die leaving property, two-thirds of it go to his three daughters as their legal shares, and the residue belongs to the two, who procured him liberty; three-fifths of it to *Zubaeda*, who contributed her *thirty*, and two-fifths to *Amína*, who added her *twenty*, pieces. To arrange the distribution without fractions, begin with *three*, the denominator of the legal share: now *two*, its numerator, is *prime* to the number of sharers; and *one* is prime also to *five*, the number of residuary portions; but *thirty* and *twenty* are *composit* to one another, since *ten* measures thirty by *three* and twenty by *two*; and five, the sum of those tenths, may be considered as standing in the place of the number of residuaries: again, *five* and *three* are prime to each other, and their product is *fifteen*, which, being multiplied into *three*, the first men-

in respect of five persons, the husband or wife, the mother, the son's daughter, and the sister by the same father; and an explanation of it has preceded. II. *Perfect* exclusion: there are two sets of persons having a claim to the inheritance: one of which sets is not excluded entirely in any case; and they are six persons, the son, the father, the husband, the daughter, the mother, and the wife; but the other set inherit in one case and in another case are excluded. This is grounded on two principles; one of which is, that "whoever is related to the deceased through any person, shall not inherit, while that person is living;" as a son's son, with the son; except the mother's children, for they inherit with her; since she has no title to the whole inheritance: the second *principle* is, "that the nearest of blood must take," and who the nearest is, we have explained in the chapter on residuaries. A person incapable of inheriting doth not exclude any one, *at least* in our opinion; but, according to *Ibnu Masúd* (may God be gracious to him!) he excludes imperfectly; as an infidel, a murderer, and a slave. A person excluded may, as all the learned agree, exclude others; as if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth.[11]

tioned denominator, produces *forty-five*, the nnmber of equal parcels, into which *Háreth's* estate must be divided; so that *thirty*, or *two-thirds*, may be distributed in *tens* to the three daughters, and *fifteen* or the residue, in *threes* to the *two*, who redeemed their father; *Zubaeda* taking in all *nineteen*, *Amína* sixteen, and *Sáfiya*, only *ten*, portions of the inheritance. This is the calculation of *Sharíf*, and the grounds of it will presently appear; but the operation might have been shortened thus: multiply the denominator of the *legal share* into the number of sharers, and then multiply the product into the denominator of the *residuary portions*.

11. The chapter of *exclusion* is very perspicuous; but the case of an *unbelieving* heir having really occurred in the time of *Alí*, we may insert it as a moment of early *Arabian* jurisprudence. *Solma* had embraced the new faith, and died, leaving her husband, and brothers by the same mother, who were all three believers, with a *son*, who continued an infidel: on a dispute con-

ON THE DIVISORS OF SHARES.

Know, that the six shares mentioned in the book of Almighty God are of two sorts: of the first are a moiety, a fourth, and an eighth; and of the second sort are two-thirds, a third, and a sixth, as the fractions are halved and doubled. Now, when any of these shares occur in cases singly, the divisor for each share is that number which gives it its name, (except half, which is from two) as a fourth denominated from four, an eighth from eight, and a third from three: when they occur by two or three, and are of the same sort, then each integral number is the proper divisor to produce its fraction, and also to produce the double of that fraction, and the double of that, as six produces a sixth, and likewise a third, and two-thirds; but when half, *which is* from the first sort, is mixed with all of the second sort or with some of them, then *the division of the estate must be* by six; when a fourth is mixed with all of the second *sort* or with some of them, then the division must be into twelve; and when an eighth is mixed with all of the second sort, or with some of them, then it must be into four and twenty parts.[12]

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cerning the inheritance *Alí* and *Zaed* gave a moiety to the widower, considering the son as actually *dead*, a third to the half brothers, and the rest to such of the residuaries as believed in the *Korán*: while *Ibnul Masúd* insisted, that the son was *dead* as to the right of inheriting, but alive as to the power of excluding, and thought that he drove the widower from *a moiety to a fourth part* only of *Solma's* estate; but the former opinion has prevailed, and in a curious book (for which there must have been abundant materials) entitled *The Dissensions of the Learned*, it is admitted that, by universal assent, if *Amru* leave a father, who is either a slave or an infidel, and a paternal grandfather, who is both free and a believer, the father is considered as *dead in law* to all purposes, and the grandfather is heir to *Amru*.

12. We come now to the *Arabian* method of ascertaining the smallest number of *parcels*, into which an estate can be divided, so as to avoid fractions in the legal distribution of it: that *number* we call the *denominator*, or divisor, of the *estate*, though the *Arabic* word mean literally *the place of coming out*; and the problem is easily solved by the following rules: if the two numbers in question be prime, multiply one of them into the other; if they be *composit* to each other, multiply the *measure* of one into the

ON THE INCREASE.

Á'úl, or *increase*, is, when some fraction remains above the *regular* divisor, or when the divisor is too small to admit one share. Know, that the whole number of divisors is seven, four of which have no increase, namely, two, three, four, and eight; and three of them have an increase. The *divisor* six is, therefore, increased by the *áúl* to ten, either by odd, or by even, numbers; twelve is raised to seventeen by odd, not by even, numbers; and twenty-four is raised to twenty-seven by one increase only; as in the case called *Mimberiyya*, (or a case answered by *Alí* when he was in the pulpit,) which was this, "*A man left* a wife, two daughters, and both his parents." After this there can be no increase, except according to *Ibn Masúd* (may God be gracious to him!) for, in his opinion, the divisor twenty-four may be raised to thirty-one; as if a man leave a wife, his mother, two sisters by the same parents, two sisters by the same mother only, and a son rendered incapable of inheriting.[13]

second, and the product will be the number sought. The whole section is as clear as it could be made in a verbal translation: and it would be superfluous to add examples of all the cases, which must occur to every one, who has attentively perused the preceding parts of the work.

18. A case, which arose in the reign of *Omar*, has given occasion to some debate: *Laelá died*, leaving only *Amru* her husband, *Hinda* her mother, and *Abla* her sister of the whole blood. Now the husband and sister were each entitled to a moiety, and the mother to a third, of *Laelá's* property, which, by the rule then established, could be divided into *six* parts only: but *Abbás*, a companion of *Muhammed*, being consulted by the *Caliph*, proposed, that the regular divisor should be so *increased*, that of *eight* parts *Amru* and *Abla* might each take *three*, and *Hinda two*. The son of *Abbás*, whose opinions were always rather ingenious than solid, was present at the decision; but, fearing the bad temper of the *Caliph*, suppressed at that time his own sentiments: he thought that the sister, having (as we have seen) a weaker right, should bear the loss, because, where different rights concur, the *weakest invariably yields*; and he said that, if an arithmetician could number the sands, yet he could never make *two halves* and *a third* equal to a whole; but this opinion has never been adopted, because, although the *sister* may in some cases be removed into a

ON THE EQUALITY, PROPORTION, AGREEMENT, AND DIFFERENCE OF TWO NUMBERS

The *temáthul (tamásul)* of two numbers is the equality of one to the other; the *tedákhul* is, when the smaller of two numbers exactly measures the larger, or exhausts it; or we call it *Tedákhul*, when the larger of two numbers is divided

distinct class of heirs, yet, with a husband and a mother of the deceased, her share is fixed by positive law, and she cannot by any means be deprived of it; so that the shares of all the claimants must be diminished in *exact proportion;* for instance, if the property had been twenty-four pieces of gold, the mother would claim *eight*, and each of the other heirs, *twelve;* now those claims cannot all be satisfied, but eight is to twelve, as six to nine, which will be the respective shares, according to the decision of *Abbas*.

Examples of the divisor *six* increased to *seven* and to *nine*, or of *twelve* to *thirteen*, *fifteen*, and *seventeen*, would appear equally ingenious, but would swell this commentary to an immoderate size: there are two decisions, however, deserving particular notice, because they were made in real causes, and have been universally approved. *Zubaeda* left her husband *Adnán*, with two sisters of the *whole blood*, two sisters *by the same mother only*, and the mother herself; whose legal shares, in order as they are mentioned, were a *moiety*, *two-thirds*, *a third*, and *a sixth:* it was impossible, therefore, to distribute them out of *thirty* pieces, for instance, divided into *six* equal parcels; but the judge, named *Shuraih*, divided the whole estate into *ten* parcels, each consisting of *three* pieces, and allotted them to the claimants in the proportion of their shares; that is to the husband, *three* parcels, to the sisters of the whole blood, *four;* to the half-sisters, *two;* and to the mother, one; assuring *Adnán*, who at first complained of the judgment, that *Omar* had made a similar decision; and this case acquired celebrity among the *Arabs* by the name of *Shuraihiyyah*. The next case, which was answered at once by *Alí*, while he was haranguing the people in the *mimbar*, or pulpit, at *Cúfa*, is fully stated in the text: the share of the widow was, regularly, an *eighth;* that of the daughters, *two-thirds;* and that of each parent, *a sixth*, all which cannot be distributed out of *twenty-four* parcels; but *Alí* pronounced, that the property of the deceased should be divided into *twenty-seven* equal parts, of which the widow should have *three;* the daughters, *sixteen;* and the two parents, *eight*. It is recorded, that when the person, who consulted *Alí*, was much dissatisfied with his answer, and asked *whether the widow was not legally entitled to an eighth*, the *Caliph* said rapidly, "it is become a *ninth*," and proceeded in his harangue with his usual eloquence.

exactly by the smaller; or we may define it thus, when the larger exceeds the smaller by one number or more equal to it, or equal to the larger; or it is, when the smaller is an aliquot part of the larger, as three of nine. The *tawáfuk*, or agreement, of two numbers is, where the smaller does not exactly measure the larger, but a third number measures them both, as eight and twenty, each of which is measured by four, and they agree in a fourth; since the number measuring them is the denominator of a fraction common to both. The *tabáyun* of two numbers is, when no third number whatever measures the two discordant numbers, as nine and ten. Now the way of knowing the agreement or disagreement between two different quantities is, that the greater be diminished by the smaller quantity on both sides, once or oftener, until they agree in one point: and if they agree in unit only, there is no numerical agreement between them; but, if they agree in any number, then they are *(said to be) mutawáfik* in a fraction, of which that number is the denominator; if two, in half; if three, in a third; if four, in a quarter; and so on, as far as ten; and, above ten, they agree in a fraction; I mean, if the number be eleven, the fraction of eleven, and, if it be fifteen, by the fraction of fifteen. Pay attention to this *rule*.[14]

14. The arithmetical part of the *Sirajiyya* is very simple, and may be found in the first pages of all our elementary books; but the difference of the *Arabian* idiom occasions a little obscurity. The chapter on primes and measures is founded on a simple analysis: when two numbers are compared, they are either equal or unequal; if unequal, either the smaller is an aliquot part of the greater, or they have a common measure, which must either be *unit alone*, or *some number*, which the *Arabs* define *a multitude composed of units*. When the greatest common measure is found by the rule, they consider the two numbers *as agreeing* in a fraction, which has that common measure for its denominator and unit for its numerator; but the nature of the *Arabic* language makes it impossible to express in a single word the fractions less

ON ARRANGEMENT.

In arranging cases there is need of seven principles; three, between the shares and the persons, and four between

than a *tenth*. thus *twenty-seven* and *twenty-four* agree, as they express it, in a third; and *a third* of each number is called its *wafk*. or measure, as *nine* of twenty-seven, and *eight* of twenty-four. After this explanation of the word, which is translated *the measure*, there will be no difficulty in the following cases.

I. *Amru* leaves only his father and mother and ten daughters: now, by the rule, his estate should be divided into *six* parts, because the share of each parent is *a sixth*, and that of all the daughters *two-thirds*; but *four* parts cannot be distributed, without a fraction, among *ten* persons; for which reason we must multiply *five*, which is the measure of *ten*, into *six*, which is the first number of parcels, and the product *thirty* is the number of lots, into which the property of *Amru* must in fact be divided; each of his parents taking *five* lots, and each of his daughters *two*.

II. *Hinda* leaves her husband, both her parents, and six daughters; whose legal shares are *a fourth*, *two-sixths*, and *two-thirds*, of the inheritance: now the regular denominator of the lots would be *twelve*, but it is raised to *fifteen* and since *eight* parcels cannot be distributed equally among *six* daughters, the *measure* of six, or *three*, is multiplied by fifteen; so that of *forty-five* lots *nine* may go to the husband, *twelve* to the parents, and *twenty-four* to the daughters, in exact proportion to their first distributive shares.

It will be very easy to apply the remaining rules to all the other examples given by *Sirajuddin*; but since, in the two last cases, which are not likely to occur, the inheritance must be divided into 4320 and 5040 parcels, the calculation, after the *Arabian* mode, in words at length would be insufferably tedious, and the reader may make it in figures with little or no trouble. The latter of those two cases is, however, subjoined; because it will fully explain the section, in which no examples are given *Saad* leaves *two* wives, *six* female ancestors, capable of inheriting together, *ten* daughters, and *seven* paternal uncles, whose shares of *twenty-four* (the root, as they call it, of this case) are *three*, *four*, *sixteen*, and *one*; for the uncles can only take what the others leave. Now by observing the primes and measures, and working according to the rule, we come to 210, which must be multiplied by *twenty-four*, and the product gives the smallest number of parcels, into which *Saad's* estate can be duly divided: the products of that multiplicand (210) by 3, 4, 16, give 630, 840, 3360, which are the allotments of the *wives*, *female ancestors*, and *daughters*; and the allotment of each share appears at once from the following proportions:

persons and persons. Of the three principles the first is, that, if the portions of all the classes be divided among them without a fraction, there is no need of multiplication, as if a man leave both parents and two daughters. The second is, that, if the portions of one class be fractional, yet there be an agreement between their portions and their persons, then the measure of the number of persons, whose shares are broken, must be multiplied by the root of the case, and its increase, if it be an increased case, as if a man leave both parents and ten daughters, or a woman leave a husband, both parents, and six daughters. The third principle is, that, if their portions leave a fraction, and there be no agreement between those portions and the persons, then the whole number of the persons, whose shares are broken, must be multiplied into the root of the case, as if a woman leave her husband and five sisters by the same

Persons.	First shares.	Multiplicand.	Shares of each.
2	3 . .	210	315.
6 ..	4 .	210	140.
10	16 .	210	336.

The last act of the *Muselman* judge is to make an actual division of the estate; and we will suppose that *Laelá*, in the case answered by *Abbás*, had left *Zaeneb* and *Abla*, two sisters of the whole blood, with *Amru*, her husband, and *Hinda*, her mother; and that her property amounted only to *twenty-five* gold *mohrs*: now the *root* of the case is increased, as we have seen, from *six* to *eight*, which is prime to twenty-five; and the products of *two*, the share of each sister, of *three*, the share of the husband, and of *one*, the share of the mother, multiplied by the number of gold *mohrs*, are 50, 75, and 25, which, divided by *eight*, give the following shares: to each sister, 6 *mohrs*, 4 *rupees*; to *Amru*, 9 ms. 6 rs; to *Hinda*, 3 ms. 2 rs. Had *Laela's* estate been *fifty* gold *mohrs*, the distribution would have been thus:

	Ms.	Rs.
Zaeneb, ...	12,	8.
Abla, ...	12,	8.
Amru, ...	18,	12.
Hinda, ...	6,	4.

father and mother. Of the four other principles the first is, that, when there is a fractional division between two classes or more, but an equality between the numbers of the persons, then the rule is, that one of the numbers be multiplied into the root of the case; as if there be six daughters, and three grandmothers, and three paternal uncles. The second is, when some of the numbers equally measure the others; then the rule is, that the greater number be multiplied into the root of the case; as, if a man leave four wives and three grandmothers and twelve paternal uncles. The third is, when some of the numbers are *mutawáfik*, or composit, with others; then the rule is, that the measure of the first of the numbers be multiplied into the whole of the second, and the product into the measure of the third, if the product of the third be *mutawáfik*, or, if not, into the whole of the third, and then into the fourth, and so on, in the same manner; after which the product must be multiplied into the root of the case: as, if a man leave four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles. The fourth principle is, when the numbers are *mutabáyan*, or not agreeing one with another; and then the rule is, that the first of the numbers be multiplied into the whole of the second, and the product multiplied by the whole of the third, and that product into the whole of the fourth, and the last product into the root of the case; as, if a man leave two wives, six female ancestors, ten daughters, and seven paternal uncles.

SECTION.

When thou desirest to know the share of each class by arrangement, multiply what each class has from the root of the case by what thou hast already multiplied into the root of the case, and the product is the share of that class, and, if thou desirest to know the share of each individual in that class by arrangement, divide what each class has

from the principle of the case by the number of the persons in it, then multiply the quotient into the multiplicand, and the product *will be* the share of each individual in that class. Another method is, to divide the multiplied number by whichever class thou thinkest proper, then to multiply the quotient into the share of that set, by which thou hast divided the multiplied number, and the product *will be* the share of each individual in that set. Another method is by the way of proportion, which is the clearest; and it is, that a proportion be ascertained for the shares of each class from the root of the case to the number of persons one by one, and that, according to such proportion from the multiplied *number*, a share be given to each individual of that class.

ON THE DIVISION OF THE PROPERTY LEFT AMONG HEIRS AND AMONG CREDITORS.

If there be a disagreement between the property left and the number arising from the arrangement, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement; but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement, into the measure of the property, and divide the product by the measure of the *number arising from the arrangement*: the quotient is the portion of that heir in both methods. This rule is in order to know the portion of each individual among the heirs; but, in order to know the portion of each class of them, multiply what each class has, according to the root of the case, into the measure of the property left, then divide the product by the measure of the case, if there be an agreement between the property left and the case; but, if there be a disagreement between them, then multiply into the whole of the property left, and di-

vide the product by the whole *number arising from the verification of the case;* and the quotient will be the portion of that class in both methods. Now, as to the payment of debts, the debts of all the creditors stand in the place of the arranging number.[15]

ON SUBTRACTION.

When any one agrees to take a part of the property left, subtract his share from *the number arising by the proof*, and divide the remainder of the property by the portions of those who remain; as if a woman leave her husband, her mother, and a paternal uncle: now *suppose that* the husband agrees to take what was in his power of his bridal gift to the wife; this is deducted from among *the heirs:* then what remains is divided between the mother and the uncle in thirds, according to their legal shares; and thus there will be two parts for the mother, and one for the uncle.[16]

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15. It seems needless to give examples of the simple rules for ascertaining the dividends of each *class;* but the passage concerning creditors, at the close of the chapter, is made obscure by extreme brevity, and requires a short illustration. Suppose the assets of *Amru* to be *nine* pieces of gold; his debts, *five* pieces to *Saad*, and *ten* to *Ahmed;* here the aggregate of the debts, *fifteen*, is composit to *nine*, and their *measures* are *five*, and *three;* so that, by the rule before mentioned of distribution among *heirs*, *Ahmed* will receive *six*, nd *Saad*, *three* pieces; but, had the debtor left *thirteen*, which would have been prime to the amount of both debts, then *fifteen*, standing in the place of the *verification*, as they call it, must be the divisor of the several products, arising from the multiplication of *ten* and *five* into thirteen, and the quotient $8\frac{2}{3}$ and $4\frac{1}{3}$ will be the respective dividends of *Ahmed* and *Saad*

16. The practice of *subtraction* arose from the case of *Abdurrahman* and his four wives, decided in the reign of *Othmán (Osman;)* and the section concerning it will be made clear by a fuller explanation of the example in the text. We have seen, that the widower is entitled to *a moiety*, the mother to *a third*, and the uncle to the *residue;* so that, if *Laela's* estate be divided into *six* parcels, the distribution may be made without a fraction: but if the widower agree to keep the *mohr*, or nuptial present to his wife, which he had never actually paid, instead of his *three-sixths* of the whole, the remainder, after deducting the *mohr*, must be divided into *three* parts, of which

ON THE RETURN.

The return is the converse of the increase; and it *takes place* in what remains above the shares of those entitled to them, when there is no legal claimant of it: this *surplus* is returned to the sharers according to their rights, except the husband or the wife; and this is the opinion of all the *Prophet's* companions, as *Alí* and his followers, may God be gracious to them! and our masters (to whom God be merciful!) have assented to it: *Zaed*, the son of *Thabit (Sábit)* says, that the surplus doth not revert, but *goes* to the public treasury; and to this opinion have assented *Urwah* and *Alzuhrí* and *Málik* and *Alsháfii*, may God be merciful to them!

Now the cases on this head are *in* four divisions: the first of them *is*, when there is in the case but one sort of kinsmen, to whom a return must be made, and none of those who are not entitled to a return: then settle the case according to the number of persons; as when the deceased has left two daughters, or two sisters, or two female ancestors; settle it, therefore, by two. The second *is*, when there are joined in the case two or three sorts of those, to whom a return must be made, without any of those, to whom there is no return:

the mother will have *two*, and the uncle, *one*. So, if the mother agree to take a jewel, or other specifick thing, in lieu of her *two-sixths*; or the uncle, a slave or a carriage, in the place of his sixth part; the remainder, which would be *four* parts in the first case, and *five* in the second, must go to the other claimants in proportion to their shares. Again; if *Amru* leave his mother *Fátima*, two sisters by the same mother, *Latífa* and *Solma*, and the son of a paternal uncle, *Selím*; here also the inheritance must be divided, by the rule, into *six* parts: now, if the deceased left a female slave and thirty gold *mohrs*, and, if *Solma* consented to keep the slave instead of her legal share, or a *sixth*, the remainder of the property must then be divided into *five* parcels, six gold *mohrs* in *each*, of which *Fátima* and *Latífa* must receive each *one* parcel, and *Selím*, the *three* parcels, which remain. It is obvious that, if the first calculation were made, in the preceding cases, on a supposition, that the taker of the specific thing was dead or incapable of inheriting, there would be either a *defect* or an *excess* in some of the allotments to the other claimants.

then settle the case according to their shares ; I mean by two, if there be two sixths in the case ; or by three, when there are a third and a sixth in it ; or by four, when there are a moiety and a sixth in it ; or by five, when there are in it two thirds and a sixth, or half and two sixths, or half and a third. The third *is* when, in the first case, there is *any one* to whom no return can be made : then give the share of him or her, to whom there is no return, according to the *lowest denominator*, and if the residue exactly quadrate with the number of persons, who are entitled to a return, *it is* well ; as *if there be* a husband and three daughters ; but, if they do not agree, then multiply the measure *of the number* of the persons, if there be an ageement between the number of persons and the residue, into the denominator of the shares of those, to whom no return is to be made : as *if there be* a husband and six daughters ; if not, multiply the whole number of the persons into the denominator of the share of those, to whom there is no return ; and the product will set the case right. The fourth is, when, in the second case, there are any to whom no return is made : then divide what remains from the denominater of the share of him or them, who have no return, by the case of those, to whom a return must be made, and, if the remainder quadrate, *it is well ;* and this *is* in one form ; that is, when a fourth *goes* to the wives, and the residue is *distributed* in thirds among those entitled to a return ; as *if there be* a wife, and a grandmother, and two sisters by the mother's side : but, if it do not quadrate, then multiply the whole case of those, who are entitled to a return, into the denominator of the share of him or her, who is not entitled to it, and the product will be the denominator of the shares of both classes ; as *if there be* four wives, and nine daughters, and six female ancestors : then multiply the shares of those, to whom no return must be made, into the case of those, who are entitled to a return, and the shares of those, to whom a return is to be made, into

what remains of the denominator of the share of those, who are not entitled to a return. If there be a fraction in some, adjust the case by the beforementioned principles (17).

ON THE DIVISION OF THE PATERNAL GRANDFATHER.

Abubecr the just, (on whom be the grace of God!) and those who followed him, among the companions of the *Prophet*, say, "the brethren of the whole blood and the brethren by the father's side inherit not with the grandfather:" this is also the decision of *Abú Hanífa*, (on whom be God's mercy!) and judgments are given conformably to it. *Zaed*, the son of *Thábit*, indeed, asserts, that they *do* inherit with the grandfather; and of this opinon are both *Abú Yusuf* and *Muhammed*, as well as *Málic* and *Alshafii*. According to *Zaed*, the son of *Thábit*, (on whom be God's mercy!) the grandfather, with brothers or sisters of the whole blood and by the father's side, takes the best in two cases, from the *mukasamah*, or *division*, and from a third of the whole estate. The meaning of *mukásamah* is, that the grandfather is placed in the division as one of the brethren, and the brethren of the half blood enter into the division with those of the whole blood, to the prejudice of the grandfather; but, when the grandfather has received his allotment, then the half blood are removed from the rest, *as if* disinherited, and

17. There is no difficulty in the chapter on the return, except what arises from the *Arabic* idiom, to which the reader is probably by this time habituated; but it is necessary to remark that, although, by the letter of the *Korán* and the strict rules of law, no *return* can be made to the *widower* or *widow*, yet an equitable practice has prevailed, in modern times, of *returning* to them, *on failure of sharers by blood and of distant kindred*. The last case in the chapter can rarely occur; and the result of the calculation (which fills ten pages in the *Persian* work of *Moulaví Kásim*) is, that, of 1440 parcels, the *four* widows take (36 × 5 =) 180; the *nine* daughters, (36 × 28 =) 1008; and the *six* female ancestors, (36 × 7 =) 252; so that 45 parts go to each *widow*, 112 to each *daughter*, and 42 to each *female ancestor*.

receive nothing; and the residue goes to the brethren of the whole blood; except when, among those of the whole blood, there is a single sister, who receives her legal share, I mean the whole after the grandfather's allotment: then, if any thing remains, *it goes* to the half blood; if not, they have nothing; and this *is the case,* when *a man leaves* a grandfather, a sister by the same father and mother, and two sisters by the same father only: *in this case* there remains to those sisters a tenth of the estate, and the correct denominator *is* twenty; but, if there be, in the preceding case, one sister by the same father only, nothing remains for her; and if one, entitled to a legal share, be mixed with them, then, after he has received his share, the grandfather has the best in three arrangements; either the division, when *a woman leaves* her husband, a grandfather, and a brother; or a third of the residue *is given,* when a man leaves a grandfather, a grandmother, and two brothers, and a sister by the same father and mother. Or a sixth of the whole estate *is given,* when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the residue is better from the grandfather, and the residue has not a complete third, multiply the denominator of the third into the root of the case. If a woman leave a grandfather, her husband, a daughter, her mother, and a sister by the same father and mother, or by the same father only, then a sixth is best for the grandfather, and the *root of the case* is raised to thirteen, and the sister has nothing. Know, that *Zaed,* the son of *Thábit,* (on whom be God's grace!) has not placed the sister by the same father and mother, or by the same father, as entitled to a share with the grandfather, except in the case, named *acdariyyah,* and that is, the husband, the mother, a grandfather, and a sister by the same father and mother, or by the same father only; *in which case* the husband *ought to have a* moiety; the mother, a third; the grandfather, a sixth; and the sister, a moiety; then

the grandfather annexes his share to that of the sister, and a division is made between them *by the rule* "a male has the portion of two females;" *and this is,* because the division is best for the grandfather. The root is *regularly* six, but is increased to nine; and a correct distribution is made by twenty-seven. The case is called *acdariyyah,* because it occurred on *the death of a* woman belonging to the tribe of *Acdar.* If, instead of the sister, there be a brother or two sisters, there is no increase, nor *is that case an acdariyyiah* (18).

ON SUCCESSION TO VESTED INTERESTS.

If some of the shares become vested inheritances before the distribution, as *if a woman leave* her husband, a daughter, and her mother, and the husband die, before the estate can be distributed, leaving a wife and both his parents, if then the daughter die leaving two sons, a daughter, and a *maternal* grandmother, and then the grandmother die leaving her husband and two brothers, the principle in this *event* is, that the case of the first deceased be arranged, and that the allotment of each heir be *considered* as delivered according to that ar-

18. The rights of the *paternal grandfather* have been more disputed than any other point of *Arabian* law; no fewer than *seventy* contradictory decisions having been made concerning them in the reign of *Omar*; but the dispute is now settled among the *Sunnis* according to the opinion of *Abú Hanífa;* and the chapter on *division* seems to have been inserted merely from respect to *Abú Yusuf* and *Muhammed,* who dissented on this point from their master: it is one of the clearest chapters in the *Sirájiyyah,* and will be useful to us, if the question should arise in a family of *Shiáhs,* who follow, no doubt, the opinions of *Alí* and *Zaed.* The case called *acdariyya,* which was decided by the son of *Thábit,* and has acquired such celebrity in *Irák,* that it is distinguished among the lawyers of that country by the epithet of *algharrá,* or the *luminous,* is a perspicuous example of the grandfather's division in a *double* ratio with the sister. The conjecture, formerly hazarded by myself, that it was named *acdariyya,* because the rules of inheritance are disturbed by it in favour of the grandfather, had occured, I see, to some *Arabs,* and is mentioned by *Sharíf,* without disapprobation.

rangement; that, next, the case of the second deceased be arranged, and that a comparison be made between what was in his hands, *or vested in interest*, from the first arrangement, and between the second arrangement, in three situations; and if, on account of equality, what *is* in his hands from the first arrangement quadrate with the second arrangement, then there is no need of multiplication; but, if it be not right, then see whether there be an agreement between the two, and multiply the measure of the second arrangement into the whole of the first arrangement; and, if there be a disagreement between them, then multiply the whole of the second arrangement into the whole of the first arrangement, and the product *will be* the denominator of both cases. The allotments of the heirs of the first deceased must be multiplied into the former multiplicand, I mean into the second arrangement or into its measure; and the allotments of the heirs of the second deceased must be multiplied into the whole of what *was* in his hands, or into its measure; and, if a third or a fourth die, put the second product in the place of the first arrangement, and the third case in the place of the second, in working; *and thus in the case of* a fourth and a fifth, and so on to infinity (19).

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19. It will be necessary to illustrate by examples the chapter on *succession to vested hereditary interests:* and, first, we may suppose, that *Zaed* had two wives, named *Zaeneb* and *Latífa*, and that *Zaeneb* died possessed of separate property, leaving her husband, her mother *Zuhra*, and *Hinda*, her daughter by a former husband: now the legal shares, in order as the sharers are named, would be a *fourth*, *a sixth*, and *a moiety;* so that regularly the estate should be divided into *twelve* parts, but it is here divided into *four*, because there must be *a return* to *Zuhra* and *Hinda*, in the proportion of their shares, that is as *one* to *three;* but, when *Zaed* has taken his *fourth*, the *three* fourths, which remain, cannot be distributed in that proportion; and, since *three* and *four* are prime to each other, we therefore multiply *four*, considered as the number of persons entitled to a return, into *four*, the denominator of the husband's *share*, and the square number answers the purpose of integral distribution; for of *sixteen* parcels *Zaed* will be entitled to *four*, *Zuhra* to *three*, and *Hinda* to *nine*.

Suppose next, that *Zaed* himself dies, before any distribution

ON DISTANT KINDRED.

A Distant kinsman *is* every relation, who is neither a sharer nor a residuary. The generality of the *Prophet's* companions repeat a tradition concerning the inheritance of dis-

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actually made, leaving only *Latífa* before mentioned, his mother *Basíra*, and his father *Abid*: here *four* parts of the former inheritance having vested in him, the distribution is easy; *one* part going to *Latífa*, as her fourth, one also to *Basíra*, as her *third of the residue*, and *two* parts to *Abid*; in exact proportion to their several claims on his own estate. Thirdly, suppose *Hinda* to die before any actual distribution, leaving the before named *Zuhra*, her grandmother, *Zubaida* her daughter, and two sons, *Hátif* and *Bashar*: now she had *a vested interest in nine* parts out of the *sixteen*, and her own estate being divisible into *six* parts, we observe, that *nine* and *six* are composit to each other, or agree, as the *Arabian* phrase is, *in a third*; so that a third of six, or *two*, must be multiplied into *sixteen*, and the product *thirty two* will be the denominator for both cases; for of *thirty two* parts *nine* will vest in *Zuhra* (*six* as mother to *Zaeneb*, and *three* as grandmother to *Hinda*,) *twelve* in the two sons, *three* in *Zubaida*, and *eight* in *Zaed's* representatives; since, to ascertain the share of each individual, the just mentioned shares out of *sixteen* must be multiplied by *two*, and those out of *six*, by *three*, which is here called the *measure* of *Hinda's* vested interest.

Let us fourthly suppose, that *Zuhra* also dies before any distribution, leaving her husband *Caab*, and two brothers, *Cálib* and *Tárif*. Now her own estate is arranged by *four*, the husband taking *a moiety*, and each of the residuaries *one fourth*; but *four* and *nine* are prime to each other; and *four*, therefore, multiplied by *thirty two*, produces an *hundred* and *twenty eight*, the denominator of both cases: we must then multiply by *four* the shares out of *thirty two*, and by *nine* the shares out of *four*, and the products will be lots of the several claimants; *eight* parcels going to *Latífa*, sixteen to *Abid*, *eight* to *Basíra*, *forty eight* in moieties to *Hátif* and *Bashar*, *twelve* to *Zubaida*, *eighteen* to *Caab*, and *eighteen* in moieties to *Cálib* and *Tárif*.

We need only add that, although the conclusion of the chapter before us be obscured by its extreme conciseness, yet it plainly means, that "when any number of heirs die successively before the distribution, if the *shares vested* in the last deceased do not quadrate with the *arrangement* of his own estate, we must consider all those, who died before him, *as one deceased heir*, and himself as the *second*, and then work by the preceding rules." To give more examples would be very easy, but the reader would find them insupportably tedious.

tant kinsmen ; and, according to this, our masters and their followers (may God be merciful to them !) have decided ; but *Zaed*, the son of *Thábit*, (on whom be God's grace !) says : " there is no inheritance for the distant kindred, but the property *undisposed of* is placed in the public treasury ;" and with him agree *Málic* and *Alshafii*, on whom be God's mercy ! Now these distant kindred *are* of four classes · the first class is descended from the deceased ; and they are the daughters' children and the children of the sons' daughters. The second sort *are* they, from whom the deceased descend ; and they are the excluded grandfathers and the excluded grandmothers. The third sort are descended from the parents of the deceased ; and they *are* the sisters' children and the brothers' daughters, and the sons of brothers by the same mother only. The fourth sort are descended from the two grandfathers and two grandmothers of the deceased ; and they are, paternal aunts, and uncles by the same mother *only*, and maternal uncles and aunts. These, and all who are related to the deceased through them, are among the distant kindred. *Abú Sulaimán* reports from *Muhammed*, the son of *Alhasan*, *who reported* from *Abú Hanífah*, (on whom be God's mercy !) that the second sort are the nearest of the *four* sorts, how high soever they ascend ; then the first, how low soever they descend ; then the third, how low soever ; and lastly, the fourth, how distant soever *their degree* : but *Abú Yusuf* and *Alhasan*, the son of *Ziyad*, report from *Abú Hanífah*, (on whom be the mercy of God !) that the nearest of the *four* sorts is the first, then the second, then the third, then the fourth, like the order of the residuaries ; and this *is* taken *as a rule* for decision. According to both *Abú Yusuf* and *Muhammed*, the third sort has a preference over the maternal grandfather (20).

20. All controversies on the claims of the *next of kin*, who are neither *sharers* nor *residuaries*, are now at an end ; for it seems to be settled, that they succeed according to the order prescribed in our text.

ON THE FIRST CLASS.

The best entitled of them to the succession is the nearest of them in degree to the deceased; as the daughter's daughter, who is preferred to the daughter of the son's daughter; and *if the claimants* are equal in degree, then the child of an heir is preferred to the child of a distant relation; as the daughter of a son's daughter is preferred to the son of a daughter's daughter; but, if their degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to *Abú Yusuf*, (may God be merciful to him!) and *Alhasan*, son of *Ziyad*, the persons of the branches are considered, and the property is distributed among them equally, whether the condition of the roots, as male or female, agree or disagree; but *Muhammed* (on whom be God's mercy!) considers the persons of the branches, if the sex of the roots agree, *in which respect* he concurs with the other two; and he considers the persons of the roots, if their sexes be different, and, he gives to the branches the inheritance of the roots, in opposition to the two *lawyers*. For instance, when *a man* leaves a daughter's son, and a daughter's daughter, *then*, according to *Abú Yusuf* and *Alhasan*, the property is distributed between them, *by the rule* "the male has the portion of two females," their persons being considered; and, according to *Muhammed*, in the same manner; because the sexes of the roots agree: and, if *a man* leave the daughter of a daughter's son, and the son of a daughter's daughter, *then*, according to the two *first mentioned lawyers*, the property *is divided* in thirds between the branches, by considering the persons, two thirds of it *being given* to the male, and one third to the female; but, according to *Muhammed*, (on whom be God's mercy!) the property *is divided* between the roots, I mean *those* in the second rank, in thirds, two thirds *going* to the daughter of the daughter's son, *namely*, the allotment of her father, and one third of it to the son of the daughter's daughter,

namely, the share of his mother. Thus, according to *Muhammed*, (to whom God be merciful!) when the children of the daughters are different *in sex*, the property is divided according te the first rank *that* differs among the roots; then the males are arranged in one class, and the females in another class, after the division; and what goes to the males is collected and distributed according to the highest difference, that occurs among their children; and, in the same manner, what goes to the females; and thus the operation is cotinued to the end according to this scheme:

S	S	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D
S	D	D	S	S	S	D	D	D	D	D	D
D	D	D	S	D	D	S	S	S	D	D	D
D	S	D	D	D	D	S	D	D	S	D	D
D	D	D	D	D	S	D	D	S	D	S	D

Thus *Muhammed* (to whom God be merciful!) takes the sex from the root at the time of the distribution, and the number from the branches; as, *if a man* leave two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, and two daughters of a daughter's son's daughter, in this form: (21)

21. On the *first* class of distant kindred the doctrine of *Abú Yúsuf* has far more simplicity than that of *Muhammed*, in which there is an appearance of intricacy; but an attentive reader will find no difficulty in the case reduced to the form of a table, in which the lowest of the six ranks are supposed to be the claimants of *Amru's* estate: he will see, that *Abú Yusuf* would divide that estate into *fifteen* parts, giving *one* to each of the female, and *two*,

The Deceased.—

Daughter	Daughter	Daughter
Son	Daughter	Daughter
Daughter	Son	Daughter
Two Daughters	Daughter	Two Sons.

In this case according to *Abú Yúsuf* (on whom be God's mercy !) the property is divided among the branches in seven parts, by considering their persons ; but, according to Muhammed, (to whom God be merciful !) the property is distributed according to the highest difference *of sex*, I mean in the second rank, in sevenths, by the number of branches in the roots ; and, according to him, four sevenths of it *go* to the daughters of the daughter's son's daughter ; since that is the share of their grandfather, and three sevenths of it, which are the allotment of the two daughters, are divided between their two children, I mean those in the third rank, in moie-

by the rule in the *Korán*, to each of the male, descendants ; but that *Muhammed* would arrange it in *sixty* parcels, *twenty four* of which would go to the representatives of the *three* sons, and *thirty six* to those of the *nine* daughters ; due regard being paid to the *double portion* of the male descendants, so as to bring the shares of the *twelve* claimants to the following order from the left hand, *twelve, eight, four* ; *nine, three, six* ; *six, two, four* ; *three, two, one.* The correctness of this method has, it seems, obtained it a preference over that of *Abú Yusuf*, whose practice, however, is followed, on account of its facility, in *Bokhára* and some other places ; although of the two different traditions from *Abú Hanífa*, that reported by *Muhammed* be the more publicly known and the more generally believed.

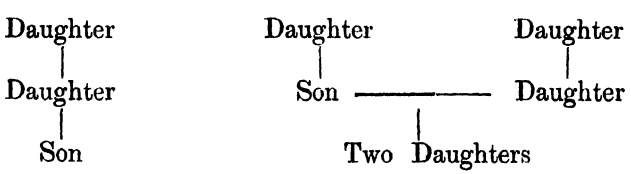
The reader would be unnecessarily fatigued, if we were to exhibit every step of the arithmetical process, by which the estate of *Amru* must be distributed, according to the opinion of *Muhammed*, between his *great grandson* by females only, and his *two great grand-daughters*, who have the advantage of a male in the line of descent ; nor does the section concerning the difference of *sides* require elucidation.

ties; one moiety to the daughter of the daughter's daughter's son, *which* is the share of her father, and the other moiety to the two sons of the daughter's daughter's daughter, being the share of their mother: the correct divisor of the property is, in this case, twenty eight. The opinion of *Muhammed* (on whom be God's mercy!) is the more generally received of the two traditions from *Abú Hanífa* (to whom God be merciful!) in all decisions concerning the distant kindred; and this was the first opinion of *Abú Yusuf*; then he departed *from it*, and said that the roots were by no means to be considered.

A SECTION.

Our learned *lawyers* (on whom be the mercy of God!) consider the *different* sides in succession; except that *Abú Yusuf* (may God be merciful to him!) considers the sides in the persons of the branches, and *Muhammed* (on whom be God's mercy!) considers the sides in the roots; as, when *a man* leaves two daughters of a daughter's daughter, who *are* also the two daughters of a daughter's son, and the son of a daughter's daughter, according to this scheme:

The Deceased.—



In this case, according to *Abú Yusuf*, the property *is divided* among them in thirds, and then the deceased is considered as if he had left four daughters and a son; two thirds of it, therefore, go to the two daughters, and one third to the son; but, according to Muhammed (to whom God be merciful!) the estate *is divided* among them in twenty eight parts, to

the two daughters twenty two shares (sixteen in right of their father and six shares in right of their mother,) and to the son six shares in right of his mother.

ON THE SECOND CLASS.

He among them, who is preferred in the succession, is the nearest of them to the deceased, on which side soever he stands; and, in the case of equality in the degrees of proximity, then he, who is related to the deceased through an heir, is preferred by the opinion of *Abú Suhail, surnamed Alferáidí Abú Fudail Alkhassáf*, and of *Alí*, the son of *Isai Albasrí*; but, no preference *is given* to him according to *Abú Sulaiman Aljurjání*, and *Abú Alí Albaiháthi Albustí*. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the sex of those, through whom they are related, agree, and their relation be on the same side, the distribution is according to their persons; but if the sex of those, to whom they are related, be different, the property is distributed according to the first rank that differs in sex, as in the first class; and, if their relation differ, then two thirds *go* to those on the father's side, that *being* the share of the father, and one third *goes* to those on the mother's side, that *being* the share of the mother: then what has been allotted to each set is distributed among them, as if their relation were the same (22).

22. On the *second* class, or the *grandfathers* and *grandmothers*, who are excluded from *shares*, we need only sum up the doctrine of our author in the words of *Sharíf*:— "The degrees in this case are either equal or unequal; if unequal, the nearer is preferred; *if equal*, the preference is given to the person claiming *through a sharer*; if, there be an *equality* in that respect, the *sides* must be the same or different; if different, the distribution must be made in *thirds*, the paternal side having *a double* allotment; if

ON THE THIRD CLASS.

The rule concerning them is the same with that concerning the first class; I mean, *that* he *is* preferred in the succession, who is nearest to the deceased: and, if they be equal in relation, then the child of a residuary *is* preferred to the child of a more distant kinsman; as, *if a man leave* the daughter of a brother's son, and the son of a sister's daughter, both of them by *the* same father and mother, or by *the same* father, or one of them by *the same* father and mother, and the other by *the same* father *only*: *in this case* the whole estate *goes* to the daughter of the brother's son, because, she is the child of a residuary; and, if it be by *the same* mother *only, distribution is made* between them *by the rule*, "A male has the share of two females," *and* by the opinion of *Abú Yusuf* (to whom God be merciful!) in thirds, according to the persons, but, by that of *Muhammed*, (may God be merciful to him!) in moieties according to the roots; and, if they be equal in proximity, and there be no child of a residuary among them, or *if* all of them be children of residuaries, or if some of them be children of residuaries, and some of them children of those entitled to shares, and their relation differ, then *Abú Yusuf* (to whom God be merciful!) considers the strongest *in consanguinity;* but *Muhammed* (may God be merciful to him!) divides the property among the brothers and sisters in moieties, considering as well the number of the branches, as the sides in the roots; and what has been allotted to each set is distributed among their branches, as in the first class.: thus, *if a man leave* the daughter of the daughter of a sister by *the same* father and mother, she is preferred to the son of the

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the same, sexes of the *roots*, or ancestors, must agree, or not; if they agree, the estate must be distributed according to the persons of the *branches*, or claimants; if not, according to the *first* rank that differs, as in the preceding class."

daughter of a brother by the same father *only*, according to *Abú Yusuf* (to whom God be merciful!) by reason of the strength of relation; but, according to *Muhammed*, (may God be merciful to him!) the property is divided between them both in moieties by consideration of the roots. So, when *a man* leaves three daughters of different brothers, and three sons and three daughters of different sisters, *as* in this figure:

The Deceased.—

Sister—Sister—Sister—Brother—Brother—Brother

by the same

Mother—Father—Father—Mother—Father—Father
and Mother and Mother

Son Son Son Daughter Daughter Daughter
Daughter Daughter Daughter.

In *this case*, according to *Abú Yusuf*, the property is divided among the branches of the whole blood, then among the branches by the same father, then among the branches by the same mother, *according to the rule* "the male has the allotment of two females," in fourths, by considering the persons; but, according to *Muhammed* (to whom God be merciful!) a third of the estate is divided equally among the branches by the same mother, in thirds, by considering the equality of their roots in the division of the parents, and the remainder among the branches of the whole blood in moieties, by considering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other between the children of the sister, the male having the allotment of two females, by considering the persons; and *the estate* is correctly divided by nine. If *a man* leave three daughters of different brothers' sons, in this manner:

The Deceased.—

Daughter ——— Daughter ——— Daughter

of a son of a Brother by the same

Father and mother———Father———Mother

All the property goes to the daughter of the son of the brother by the same father and mother, by the unanimous opinion *of the learned*, since she is the child of a residuary and hath also the strength of consanguinity. (23)

ON THE FOURTH CLASS.

The rule as to them *is*, that, when there is only one of them, he has a right to the whole property, since there is none to obstruct him ; and, when there are several, and the sides of their relation are the same, as paternal aunts and paternal uncles by the same mother *with the father*,or maternal uncles and aunts, then the stronger of them in consanguinity is preferred, by the general assent ; I mean, they, who are *related* by father and mother, are preferred to those, who are *related* by the father *only*, and they, who are *related* by the father, are preferred to those, who are *related* by the mother only, whether they be males or females ; and, if there be males and females and their relation be equal, then the male has the allotment of two females ; as, *if there be a* paternal uncle and aunt both by *one* mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father, or by the same mother

23. There seems no difficulty in the chapter on the third class of distant kindred ; but it must be remarked, that the *branches*, as they are called, from *roots* by the same *father only*, are excluded by the *whole blood* ; not those by the same *mother only*, who take equally, according to the *Korán*, in exception to the general rule, without any distinction of sex.

only : and if the sides of their consanguinity be different, then no regard *is shown* to the strength of relation ; as, if *there be* a paternal aunt by the same father and mother, and a maternal aunt by the same mother, or a maternal aunt by the same father and mother, and a paternal aunt by the same mother only, then two thirds *go* to the kindred of the father, for they *are* the father's allotment, and one third to the kindred of the mother, for that *is* the mother's allotment ; then what is allotted to each set is divided among them, as if the place of their consanguinity were the same. (24)

ON THEIR CHILDREN, AND THE RULES CONCERNING THEM.

The rule as to them *is* like the rule concerning the first class ; I mean, *that* the best entitled of them to the succession is the nearest of them to the deceased on which ever side he is *related ;* and, if they be equal in relation, and the

24. Although the claims of *uncles* and *aunts*, in three cases, be clearly explained in the text, yet it may not be improper to subjoin an example from the commentary of *Maulaví Kásim*, which the following pedigree will make more intelligible than his dry state of the case :

Hinda——Amru——*Sulma*——(—Suhail)——Umar
Lebíd Zaeneb Azza Becr

Zaed.

Amru, having had by *Hinda* a son, named *Lebíd*, married *Sulma*, by whom he had a daughter named *Zaeneb* : after *Amru's* death, *Sulma* married *Suhail*, to whom she produced *Azza*, and after his death, she married *Umar*, by whom she became the mother of *Becr* : now *Zaed* was the son of *Lebíd* and *Azza* ; and he died, leaving no heirs but Becr, the brother, by the *same mother*, of his mother *Azza*, and *Zaeneb*, who was his *paternal aunt*, and by the *same father Amru*, and his *maternal* aunt by the *same mother Sulma*. In this case, the property of *Zaed* must be divided into *nine* parcels, of which the *paternal* aunt will have *two thirds ;* and the remaining *third* will go to the *maternal uncle* and *aunt* in the ratio of *two* to *one ;* so that Zaeneb, in her two characters, will be entitled to *seven ninths*.

place of their consanguinity be the same, then he, who has the strength of blood, is preferred, by the general assent; and, if they be equal in degree and in blood, and the place of their consanguinity be the same, then the child of a residuary *is* preferred to whoever is not *such;* as, *if a man* leave the daughter of a paternal uncle and the son of a paternal aunt, both of them by *the same* father and mother, or by *the same* father, all the property goes to the daughter of the paternal uncle, and, if one of them be by *the same* father and mother, and the other by the same father only, *then* all the estate goes to the claimant who has the strength of consanguinity, according to the clearer tradition; *and this* by analogy to the maternal aunt by the same father, for though she be the child of a distant kinsman, yet she is preferred, by the strength of consanguinity, to the maternal aunt by the *same* mother *only,* though she be the child of an heir; since the weight which prevails by itself, that is, the strength of consanguinity, is greater than the weight by another, which is the descent from an heir. Some of them (the learned) say, *that* the whole estate goes to the daughter of the paternal uncle by the same father, since she is the daughter of a residuary; and, if they be equal in degree, yet the place of their relation differ, they have no regard *shown* to the strength of consanguinity, nor to the descent from a residuary, according to the clearer tradition; by analogy to the paternal aunt by the same father and mother, for though she have two bloods, and be the child of an heir on both sides, and her mother be entitled to a legal share, yet she is not preferred to the maternal aunt by the *same* father; but two thirds *go* to whoever is related by the father; and there regard is shown to the strength of blood; then to the descent from a residuary; and one third *goes* to whoever is related by the mother, and there *too* regard is shown to strength of consanguinity: then, according to *Abú Yusuf,* (may God be merciful to him!) what belongs to each set is divided among the per-

sons of their branches, with attention to the number of sides in the branches ; and according to *Muhammed*, (may God be merciful to him !) the property is distributed by the first line, *that* differs, with attention to the number of the branches and of the sides in the roots, as in the first class ; then this rule is applied to the sides of the paternal uncles of his parents and their maternal uncles ; then to their children ; then to the side of the paternal uncles of the parents of his parents, and to their maternal uncles ; then to their children, as in the *case* of residuaries. (30)

30. There seems no necessity to expatiate on the *children* of *uncles and aunts*, or on the *cousins*, as we should call them, in different degrees ; because the text will be sufficiently perspicuous to those, who perfectly understand the preceding sections : but since a curious case is put by *Sharíf*, I am unwilling to suppress it ; especially as it will throw light on the whole subject before us. The *father* of *Amru* had a brother, *Zaed*, and two sisters, *Zaeneb* and *Aáisha*, by the same father only : his mother also had a brother, *Hareth*, and two sisters by the same father, named *Hinda* and *Asima* : first, his father and mother died ; then, all his *uncles* and *aunts*, leaving the following issue. *Zaed* left two daughter's daughters, who were also the daughters of *Zaeneb's* son ; *Aáisha*, two sons of her daughter ; *Háreth*, two daughter's sons, who were also the sons of the sons of *Hinda ;* and *Asima*, two daughter's daughters ; as in this pedigree.

Zaed.	Zaeneb.	Aáisha.	Háreth.	Hinda.	Asima.
D.	S.	D	D.	S.	D.
D. D.		S. S.	S. S.		D D.

Amru himself afterwards died, with no heirs but the *grandchildren* of his uncles and aunts. In this case *Abú Yusuf* would have divided the inheritance into *thirty* parts, *twenty* for the *paternal* side ; that is, *five* for each of the sons, and as many for each of the daughters, who have a double relation ; and *ten* for the *maternal* side, or four for each of the sons, who are doubly related, and *one* for each of the daughters : but *Mahommed*, having divided *Amru's* estate into *thirty six* allotments, would have given *twenty four* to the paternal, and *twelve* to the maternal, side ; that is, *six* to each of *Zaed's* granddaughters, as such, and *four* to each of them, as granddaughters of *Zaeneb* ; two to each of *Aáisha's* grandsons ; *three* to each grandson of *Háreth*, as such ; and *two* more to each of them, as grandsons of *Hinda* ; while *one thirty sixth* part would have gone to each of

ON HERMAPHRODITES.

To the hermaphrodite, *whose sex is quite* doubtful, *is allotted* the smaller of two shares, I mean the worse of two conditions, according to *Abú Hanífah*, (may God be merciful to him!) and his friends; and this is the doctrine of the generality of the *Prophet's* companions, (may God be gracious to them!) and conformable to it are decisions *given;* as, when *a man* leaves a son, and a daughter, and an hermaphrodite, then the hermaphrodite has the share of a daughter, since that is ascertained: and according to *Ámir Alshábí*, (and this is the opinion of *Ibnu Abbás*, (may God be gracious to them both!) the hermaphodite has a moiety of the two shares in the controversy; but *the two great lawyers* differ in putting in practice the doctrine of *Alshábí*; *for Abú Yusuf* says, *that* the son has one share, and the daughter half a share, and the hermaphrodite three fourths of a share, since the hermaphrodite would be entitled to a share, if he were a male, and to half a share, if he were a female, and this *is* settled by *his* taking half the sum of the two portions; or, we may say, he takes the moiety which is ascertained, together with half the moiety which is disputed, so that there come to him three fourths of a share; for he (*Abú Yusuf*) *pays* attention to the legal share and to the increase, and he verifies *the case* by nine: or, we may say, the son has two shares, and the daughter one share, and the hermaphrodite a moiety of the two allotments, and that *is* a share and half a share. But *Muhammed* (may God be merciful to him!) says, that the hermaphrodite would take two=fifths of the estate, if he were a male, and a fourth of the estate, if he were a female, and that he takes a moiety of the two allotments, and that *will*

Asima's female descendants. The reason of these different distributions will appear from what has preceded: but the arithmetical processes would fill many pages, and would be thought, I am persuaded, unnecessarily prolix.

give him one fifth and an eighth by attention to both sexes; and the case is rectified by forty; since that is the product of one of the *numbers in the* two cases, which is four multiplied into the other, which is five, and that product multiplied by two (*which is the number of the*) cases; and then he, who takes any thing by five, *has it* multiplied into four, and he, who takes any thing by four, *has it* multiplied into five; so that thirteen shares *go* to the hermaphrodite, and eighteen to the son, and nine to the daughter (31.)

ON PREGNANCY.

The longest time of pregnancy *is* two years, according to *Abú Hanífah* (may God be merciful to him!) and his companions; and according to *Laith*, the son of *Sád Alfahmí*, (may God be merciful to him!) three years; and, according to *Alsháfii*, (may God be merciful to him!) four years: but according to *Alzuhrí*, (may God be merciful to him!) seven years: and the shortest time for it is six months. There is reserved for the child in the womb, according to *Abú Hanífah* (may God be merciful to him!) the portion of four sons, or the portion of four daughters, whichever of the two is most; and there is given to the rest of the heirs the smallest of the portions; but, according to *Muhammed* (may God be merciful to him!) there is reserved the portion of three sons or of three daughters, whichever of the two is most: *Laith*, son of *Sád*, (may God be gracious to him!) reports this *opinion* from him; but, by another report, *there is reserved* the portion of two sons; and one of the two opinions is that of *Abú Yusuf* (may God be merciful to him!) as *Hishám* reports it from him; but *Alkhassáf* reports from *Abú Yusuf* (may God be merciful to him!) that there should be reserved the

31. On the chapter concerning hermaphrodites, I shall make no particular observation; since monstrous births are, I trust, extremely rare in all countries, and the subject is too shocking to be discussed without actual necessity.

share of one son or of one daughter; and, according to this, decisions *are made*; and security must be taken, according to his opinion. And, if the pregnancy was by the deceased, and the widow produce a child at the full *time* of the longest period *allowed* for pregnancy, or within it, and the woman hath not confessed her having broken her legal term *of abstinence, that child* shall inherit, and others may inherit from him; but, *if* she produce a child after the longest *time* of gestation, he shall not inherit, nor shall others inherit from him: and if the pregnancy was from another man than the deceased, and she, *the kinswoman*, produce a child in six months or less, he shall inherit; but, if she produce the child after the least period of gestation, he shall not inherit.

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that by which life is proved; as a voice, or sneezing, or weeping, or smiling, or moving a limb; and if the smallest *part* of the child come out, and he then die, he shall not inherit; but if the greater *part* of him come out, and then he die, he shall inherit: and if he come out straight (*or with his head first*) then his breast is considered; I mean, if his whole breast come out, he shall inherit; but if he come out inverted (*or with his feet first*) then his navel is considered.

The chief rule in arranging cases on pregnancy is, that the case be arranged by two suppositions, I mean by supposing that the child in the womb is a male, and by supposing that it is a female: then, compare the arrangement of both cases; and, if the numbers agree, multiply the measure of one of the two into the whole of the other; and if they disagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the case: then multiply the allotment of him, who would have something from the case which supposes a male, into that of the case, which supposes a female, or into its measure; and then that of him, who takes on the supposition

of a female, into the case of the male, or into its measure, as we have directed concerning the hermaphrodites; then examine the two products of that multiplication; and whether of the two is the less, that shall be given to such an heir; and the difference between them must be reserved from the allotment of that heir, and, when the child appears, if he be entitled to the whole of what has been reserved, it is well, but, if he be entitled to a part, let him take that part, and let the remainder be distributed among the *other* heirs, and let there be given to each of those heirs what was reserved from his allotment: as, when a man has left a daughter and both his parents, and a wife pregnant, then the case *is rectified* by twenty=four on the supposition that the child in the womb is a male, and by twenty-seven on the supposition that it is a female: now between the two numbers of the arrangement there is an agreement in a third, and, when the measure of one of the two is multiplied into the whole of the other, the product amounts to two hundred and sixteen, and by that *number* is the case verified; and, on the supposition of its male sex, the wife takes twenty-seven shares, and each of the two parents, thirty-six; but, on the supposition of its female sex, the wife has twenty four, and each of the parents, thirty-two; and twenty-four are given to the wife, and three shares from her allotment are reserved; and from the allotment of each of the parents are reserved four shares; and thirteen shares are given to the daughter; since the *part* reserved in her right *is* the allotment of four sons, according to *Abú Hanífah,* (may God be merciful to him!) and when the sons are four, then her allotment is one share and four=ninths of a share out of four-and-twenty multiplied into nine, and that makes thirteen shares, and this *belongs* to her, and the residue *is* reserved, which *amounts to* an hundred and fifteen shares. If the widow bring forth one daughter or more, then all the *part* reserved *goes* to the daughters; and, if she bring forth

one son or more, then must be given to the widow and both parents what was reserved from their shares; and what remains must be divided among the children: and, if she bring forth a dead child, then must be given to the widow and both parents what was reserved from their shares, and to the daughter a complete moiety, that is, ninety-five shares more, and the remainder, which is nine shares, to the father, since he *is* the residuary. (32)

32. Nor will it answer, I imagine, any useful purpose to relate the old *Arabian* stories, and strange opinions of some lawyers, concerning the longest possible time of gestation; which is now limited, on the authority of *Aáisha*, one of *Mohammed's* wives, to *two years*; and, though the *Muselmans* have traditionary accounts of *three, four*, or even *five* children produced at one birth, yet the practice, we find, is to reserve the share of *one* son; or that of one daughter, if, on supposition of her birth, the sum reserved would be larger. The practice of *reservation* for the unborn child is well explained by the case in the text, to which we may now proceed, since the rest of the chapter needs no illustration; unless it be necessary to inform the reader, that a widow ought by law to abstain, for a certain time after her husband's death, from the caresses of any other man; and, if she freely confess that she has not abstained, it cannot be certain that her husband was the father of a child born more than six months after his death. Let us then suppose *Amru* to die, leaving a daughter *Zaeneb*, his mother *Asuma*, his father *Lebíd*, and wife, *Hinda enceint.* So that, if a male child be born, *Amru's* estate ought regularly to be divided into *twenty-four* parts, but, on the birth of a female, into *twenty-seven*; because, in the first case, the *shares* are an *eighth*, for the widow, and a *sixth* for each of the parents; but, in the second, besides the shares just mentioned, the daughters would have *two thirds* between them, and it would be the case of *Mimberiyya.* Now *three* is the common measure of *twenty-four* and *twenty-seven*, and the several *measures* of those numbers are *eight* and *nine*, either of which, multiplied into the other *whole* number, gives *two hundred* and *sixteen* for the product; and that, according to what has preceded, is the number of shares into which the inheritance must be actually divided. In the first case *Hinda* would have *twenty-seven* shares; *Lebíd* and *Asuma*, each *thirty-six*; the posthumous son *seventy-eight*; and *Zaeneb*, his sister, *thirty-nine*; but, in the second, the widow would have *twenty-four*; and each of the parents, *thirty-two*; while the posthumous daughter and her sister would divide the remainder between them, each taking *sixty-four* shares. Should

ON A LOST PERSON.

A Lost person is *considered as* living in *regard to* his estate; so that no one can inherit from him; and his estate is reserved, until his death can be ascertained; or the term for *a presumption of it* has passed over. Now the traditionary opinions differ concerning that term; for, by the clearer tradition, "when not one of his equals in age remains, judgment may be given of his death;" but *Hasan*, the son of *Ziyad*, reports from *Abú Hanífah*, (may God be merciful to him!) that the term is an hundred and twenty years from the day on which he was born, and *Muhammed* says, an hundred and ten years; and *Abú Yusuf* says, an hundred and five years; and some of them, *the learned*, say, ninety years; and according to that *opinion* are decisions *made*. Some of *the learned in the* law say, that the estate of a lost person must be reserved for the final regulation of the *Imám*, and the judgment suspended as to the right of another person, so that his share from the estate of his ancestors must be kept, as in the *case* of pregnancy; and, when the term *is* elapsed, and judgment given of his death, then his estate *goes* to his heirs, *who are* to be found, according to the judgment on his decease; and, what was reserved on his account from the estate of his ancestor, is restored to the heir of his ancestor, from whose estate that share was reserved; since the lost person *is* dead as to the estate of another.

The principle in arranging cases concerning a lost person *is*, that the case be arranged on a supposition of his life,

four posthumous sons be born, *ninety-nine* shares would go to the widow and both parents; while the remainder would be divided among the children by the rule before mentioned, *Zaeneb* receiving *thirteen* parts, and each of her brothers, *twenty-six*; but, in the case of a miscarriage, the daughter would be entitled to *a hundred* and *eight* parts, or a moiety of the whole estate, and the *nine* parts remaining would go to *Lebíd* as residuary heir.

life, and then arranged on a supposition of his death; and the rest of the operation *is* what we have mentioned in the chapter of pregnancy. (33)

33. The time, at which an absent person is presumed in law to be dead, has varied, we see, in different ages; but the modern practice I understand to be this. If *Zaed* has been so long absent, that no man can tell whether he be dead or alive, and if *seventy* years have elapsed from the day of his birth, he is presumed to be dead, as to *his own* property, from the end of that term, but, as to his hereditary claims on the property, *of another*, from the day of his absence; so that, in the first case, no person, dying within the seventy years, could have inherited any part of *his* estate; nor, in the second, could he inherit from any one, who died after the day, when he first was missed. Though the arrangement of an inheritance, on which an absent person may have a claim, be sufficiently clear from what has just preceded, yet a feigned case in illustration of it will not, perhaps, be thought wholly superfluous. If *Hinda* then die at *Murshedabád*, leaving *Amru* her husband, with two sisters of the whole blood, *Nárida* and *Sacína*, all residing in that city, and a whole brother *Zaed*, who has long been absent and unheard of, we must consider what effect his life or his death would have on the inheritance: if he be dead, *Amru* must have *a moiety* of the estate, and the sisters *two thirds* between them; and, if he be living, the widower will still have a right to his half, but *Zaed* will take twice as much as either of the sisters. Now, on the first supposition, the assets of *Hinda* must be divided, as we have shown, into *seven shares*, of which *Amru* must have *three*, and each of the sisters, *two*; but, on the second, into *eight* parts, *four* of which go to the husband, and *two* to the brother, while *Nárida* and *Sacína* can have only *one* apiece; so that the widower has an interest in supposing *Zaed* alive, and the sisters, in supposing him dead: *fifty-six*, therefore, or the product of *seven* and *eight*, which are *prime* to one another, is the number, of shares, into which the estate must be divided; *twenty-four* of them being delivered to *Amru*, and *seven* to each of the females, as the least shares to which they can in either event be severally entitled; if *Zaed* then return to the city, *four* shares more go to *Amru*, and *fourteen* are the right of the brother; but, if his death be proved, or presumed by lapse of time, the *eighteen* reserved shares must be divided equally between *Sacína* and *Nárida*, to complete their *two sevenths*, which the law gives, in that case, to each of them. The *Persian* commentator has added three cases, in one of which the two first divisors of the assets are *composit* to each other; but the operation in all of them is too easy to require an example.

ON AN APOSTATE.

When an apostate *from the faith* has died naturally, or been killed, or passed into a hostile country, and the *Kádí* has given judgment on his passage *thither*, then what he had acquired, at the time of his being a believer, *goes* to his heirs, *who are* believers; and what he has gained since the time of the apostasy is placed in the public treasury, according to *Abú Hanífah*, (may God be merciful to him!) but, according to the two *lawyers*, (*Abú Yúsuf* and *Mahammed*,) both the acquisitions *go* to his believing heirs; and, according to *Alsháfii*, (may God be merciful to him!) both the acquisitions are placed in the public treasury; and what he gained after his arrival in the hostile country, that *is* confiscated by the general consent: and all the property of a female apostate *goes* to her heirs, *who are* believers, without diversity of opinion among our masters, to whom God be merciful! but an apostate shall not inherit from any one, neither from a believer nor from an apostate like himself, and so a female apostate shall not inherit from any one; except when the people of a whole district become apostates altogether, for then they inherit reciprocally. (34.)

ON A CAPTIVE.

The rule concerning a captive *is* like the rule of other believers in regard to inheritance, as long as he has not departed from the faith; but, if he has departed from the faith, then the rule concerning him *is* the rule concerning an apostate; but, if his apostasy be not known, nor his life, nor his death, then the rule concerning him *is* the rule concerning a lost person.

34. In the sections concerning apostates and prisoners of war, there seems to be no obscurity; but it is proper to add, that, as the law is now settled, the heirs of an apostate, who were in being at the time of his death, are entitled to their legal shares, whether they were born before or after his apostasy; though a husband or wife cannot succeed to an apostate, because a change of religion is an immediate dissolution of the marriage.

ON PERSONS DROWNED, OR BURNED, OR OVERWHELMEDIN RUINS.

When a company *of persons* die,and it is not known which of them died first, they are considered as if they had died at the same moment, and the estate of each of them *goes* to his heirs,*who are* living ; and some of the deceased shall not inherit from others : this is the approved *opinion.* But *Alì*, and *Ibnu Masùùd* say, according to one of the traditions from them, *that* some of them shall inherit from others, except in what each of them has inherited from the companion of his fate. (35.)

The end.

35. We are now come to the concluding section, which cannot be better illustrated than by two feigned cases from the *Persian* and *Arabian* comments. 1. *Zaed* and his daughter *Abla* were at sea in the same ship, together with *Bashar*, his brother's son, and his great nephew *Amru*, son of *Bashar* : the ship was lost, and all, who were in it, perished ; so that which of them first died, could never be clearly ascertained. Now *Amru* left behind him a wife and a daughter ; and *Abla* had an only son : in this case, by the opinion of *Abú Hanífah* and his followers, the four drowned persons are supposed to have perished in the same instant,and their several estates go to their surviving heirs respectively, according to the rules which have been already explained ; but by one of two traditions from *Alì*, the assets of *Zaed* being equally divided, and *Abla* being supposed to have outlived her father, her son takes one moiety in her right, while the other moiety is conceived at first to have vested in *Bashar*, and then in *Amru*, between whose widow and daughter it is distributable according to law. 2. *Kásim* and his younger half brother *Hasan* were drowned in the same boat, each leaving a mother, a daughter, and a patron, by whom each of them had been manumitted : then, if each of them left *ninety* pieces of gold on shore, the property of each must be severally distributed, according to the *Hanífeans*, the daughter of each taking *half*, or *forty five* pieces ; the mother a *sixth*, or *fifteen*, and the manumittor, as residuary, the *thirty* pieces which remain ; but according to *Alì*, the younger brother *Hasan* being first considered as the survivor, that residue vests in him, and is then distributed, in the just mentioned ratio ; *half* of it, or *fifteen*, going to his daughter ; a *sixth*, or *five* pieces, to his mother ; and *ten*, the residue, to his patron ; next, *Kásim* being supposed to have survived, the same rule is applied to him ; so that the daughter of each takes on the whole *sixty* ; the mother, *twenty* ; and the manumittor, *ten* pieces of gold.

The end.

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PRINCIPLES

OF

Mohummudan Law

BEING

A COMPILATION OF THE PRIMARY RULES RELATIVE TO THE DOCTRINE OF INHERITANCE (INCLUDING THE TENETS OF THE SHIA SECTARIES,) CONTRACTS, AND MISCELLANEOUS SUBJECTS;

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY

AND

PRELIMINARY REMARKS:

By W. H. MACNAGHTEN Esqr.

OF THE BENGAL CIVIL SERVICE.

1825

A NEW EDITION

BY

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REMARKS BY THE EDITOR.

This is the clearest, if not the simplest or most sufficient work on the Mahomedan law written in English. No work was presented to the public with greater diffidence and none has met with greater success than this. It is in fact superior to the author's work on the Hindu law, although the latter is of a subsequent date. The work in question had been out of print, and was scarcely to be had even for forty rupees a copy, until the publication of a new Edition in the last year by Mr. William Sloan, pleader of the Madras Sudder Court; but even that is not within the reach of students whose resources are limited, a single copy thereof not being obtainable here under five and twenty rupees. It being therefore very desirable that copies of this work, or at least of the first part of it which contains the principles, should be obtained at a moderate price, I undertook to reprint those principles, with the preliminary remarks, abridged and the index improved. The reader will find that the present Edition exactly corresponds with the original as respects the principles. The preliminary remarks only having been abridged by a selection of the most useful parts and omission of unimportant matter, and the Arabick abstracts, which are of no avail but to display the author's knowledge of other laws and languages. The index to the principles, as contained in the original, referred to their respective chapters, sections, and numbers; but it being very desirable that there should be a more simple and ready means to find out any part wanted, as the profession cannot afford to waste time to find out first the chapter, then the section, and then the number of the principle wanted, discarding such process, I have set down the numbers of the pages and principles, by reference to which the particular point wanted may be quickly found. I have moreover, at the end of each paragraph of the preliminary remarks, here abridged, inserted the page of the original in which the same is contained, so that it may, if desired, be easily traced in the original.

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The brief disquisition on the Moohummudan Law, which I have here ventured to introduce, may not be matter of much utility; but I was amused by the analogy occasionally observable between this and other codes of jurisprudence, and it appeared to me that, by recording such observations as my limited knowledge suggested, I might be the means of attracting the attention of others to the genius of the Law in question. (p. iii.)

The provisions of the Moohummudan Law of inheritance have for their basis the following passages of the *Koran*: "God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid: they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid: and if a man or woman's substance

many of the persons above enumerated have the privilege of simultaneous succession, whether the property be real or personal; which circumstance is the chief peculiarity of the Moohummudan code. (p. xi.)

The rules agreeably to which distributions are made would, at first sight, appear rather complex and intricate; but they may be speedily acquired by a very moderate share of attention, and, when once known, there can arise no legal problem, relative to successions, which would not, by their means, admit of easy and satisfactory solution. It must, at the same time, be admitted, that the heterodox code, or that which is observed by the *Sehi'a* (commonly called the *Imameeya* sect, as they follow the doctrines of the twelve *Imáms*) can boast of much greater simplicity. This code has hitherto had no weight in India, and even at Lucknow, the seat of heterodox majesty itself, the tenets of the *Soonnees* are adhered to. I have however given a compendium of their law of inheritance, extracted from the "*Shuraya ool Islam*," a work of the highest authority among them. This I was induced to do, as no account has ever been rendered, to my knowledge, of the doctrine of the sect in question, on the law of inheritance; and as I have reason to believe that our courts of justice have passed decisions avowedly in conformity to its principles. Considering the universal toleration that prevails throughout the British dominions in India, it is perhaps but equitable, that the Law should be administered to the *Sectaries* in question, agreeably to their own notions of jurisprudence, especially in matters affecting the succession to property, in which cases both parties are of course always of the same persuasion. (pp. xi & xii.)

Where the law expressly prohibits the receipt of interest on money, and all usurious contracts, it is natural to find the provisions regarding purchase, sale, and similar transac-

tions, extremely simple and certain in their nature. Such is accordingly the case in the Moohummudan Law. There is no distinction made between sale and permutation; a barter of one commodity for another being designated a sale. The principal points of difference seem to be, the absence of any discrimination in the Moohummudan Law of sales of real and personal property, and its recognising verbal contracts as of equal validity with written ones. Another essential point of difference is that the maxim of *Caveat emptor* finds no place in this code. (pp. xii & xiii.)

The most efficient safeguards against the effects of improvidence in purchasers are established, so much so, as almost to exclude the possibility of circumvention. A warranty is implied in every sale, and a reasonable period of option may be stipulated, during which it is lawful to annul the contract. Where property has been purchased unseen it may be returned, if it does not fully answer the description, and the seller may at any time be compelled to receive back the property and refund the purchase money, on the discovery of a blemish or defect, the existence of which, when in the possession of the seller, may be susceptible of proof. (p. xiii.)

In exchange, where the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition to the validity of the contract, and no term of credit, on either side, is admissible, which would be advantageous to one of the parties, and savour therefore of usury; but where goods are sold for money, or money is advanced for goods, a term may be stipulated for the payment of the money, or for the delivery of the goods. So tenacious however is the Law, of certainty, that it will not admit of any, the least, indefiniteness in the term. The date must be specified. From the above observations it will be seen, that the Moohummudan Law of sales does not differ very materially from the Civil Law, to which the provisions of

the Scottish code bear a close resemblance. (pp. xiii & xiv.)

Sales of land and other immovable property are clogged with an incumbrance, which is not, however, peculiar to this code. I allude to the Law of pre-emption. This confers the privilege on a partner or neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of. (p. xiv.)

By the Moohummudan Law, unquestionably, Hindoos have the same title to claim the privilege as Moosulmauns; but, assuming it to form no part of their own Law, I apprehend they ought not to be permitted to take advantage of the doctrine in question. The principles of the Hindoo and Moosulmaun Codes are declared applicable to cases of inheritance, contract, &c. arising among these two great bodies of the community; but at the same time applicable respectively only. It is declared, also, that where the parties are of different persuasions, the Law of the defendant shall be adhered to; but by this provision, it was never intended that a plaintiff might make his election between the two codes, and prefer a claim to be decided by that Law which best suited his particular purpose. (p. xv.)

In the *Hidaya* the right of *Shoofaa* (pre-emption) is declared to be but a feeble right, as it is the disseising another of his property, merely in order to prevent apprehended inconvenience: its extension to all cases of neighbourhood cannot fail to depreciate the value of landed property; and being impressed with a conviction of the unreasonableness of the Law in question, according to modern construction, I should feel very much inclined to circumscribe its operation within as narrow bounds as possible. (p. xvii)

The law is extremely favorable to the donor where property is gratuitously conveyed. A gift should always be accompanied by delivery of possession. False pretences, legal incapacity,

or other similar circumstances, under which the validity of a gift may be questioned, and which would render it either void *ab initio*, or voidable, need not be specified: they are the same as those which obtain in most other codes of jurisprudence, and they would no doubt avail in case of a suit brought by any representative of the donor to set aside a gift unduly made. But *as to the donor himself*, he has power to demand restoration, even where the gift may not have been attended by any disqualifying circumstances. This power, however, of revoking gifts, is subject to certain limitations. According to the English law, a gift is revocable only under circumstances which would equally have operated to avoid any species of contract. According to the civil law there were three causes only which could justify the revocation of a gift. But according to the Moohummudan Law, there are only seven circumstances under which a gift is not revocable. A gift made on a deathbed, though not made in contemplation of death, is nevertheless not considered as a gift *inter vivos*, but has the effect of a legacy only, and consequently cannot extend to more than a third of the donor's estate. It should here, however, be mentioned, that though gifts to relations are generally irrevocable, yet a gift from a father to his minor son is revocable, at the pleasure of the former. The right of a husband to revoke a gift to his wife, and *vice versa*, does not appear to be recognised, as it is in the Roman and Scottish Laws. (pp. xx—xxii)

The disposition of a testator being legally restricted to one third of his estate, but little uncertainty can exist on the doctrine of wills and testaments. If the legacies exceed the amount above specified the will is considered *inofficious*, and its provisions will be carried into effect *pro tanto* only. Nuncupative and written wills are of equal validity; and the same degree of evidence is required to prove them as is necessary to the establishment of any other ordinary transaction between man and man. (p. xxii.)

The latitude granted by the permission of polygamy, and the apparent facility of divorce, are not, it must be admitted, accordant with the strict principles of impartial justice; but the evil, I believe, exists chiefey in theory, and but little inconvenience is found to follow it in practice. (p. xxiii.)

Much misconception exists, I imagine, however, relative to the Moohummudan Law on the subject of legitimate and illegitimate issue; and it seems generally supposed that, agreeably to its provisions, no person can be considered a bastard. The learned Sale observes, that "among the Moohummudans the children of their concubines or slaves are esteemed as generally legitimate with those of their legal and ingenuous wives, none being accounted bastards except such only as are born of *common* women, and whose fathers are unknown." This, I apprehend, with all due difference, is carrying the doctrine to an extent unwarranted by Law; for where children are not born of women proved to be married to their fathers, or of females, slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy, and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children (though not born of *common* women) will be considered bastards to all intents and purposes. (p. xxiv.)

Another learned author also, citing the Law of Solon, that a bastard shall not be deemed next of kin, nor any relation be supposed between him and the proper sons, proceeds to state, "on the contrary, amongst the Mahometans, as to the point of sharing the father's estate, there is no difference observed between the sons of the wife, the concubine, or the servant maid;" whereas, in point of fact, the marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate. It must be

admitted, at the same time, that there is no more difficulty in establishing a marriage by the Moohummudan than by the Scottish law, according to which, though no formal consent should appear, marriage is presumed from the cohabitation, or living together at bed and board, of a man and woman who are generally reputed husband and wife. Marriage also, according to this code, is entirely a civil contract. (pp. xxiv & xxv.)

Their sentence of divorce is pronounced with as much facility as was repudiation among the Romans, in case of espousals. There is no occasion for any particular cause; mere whim is sufficient. I have already alluded to the small inconvenience which this facility produces in practice. Where conscientious and honorable feelings are insufficient to restrain a man from putting away his wife, without cause, the temporal impediments are by no means trifling. Dower is demandable on divorce, and, with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay. (p. xxvi)

The mode by which a wife is endowed, according to the Moohummudan Law, partakes partly of the nature of a jointure and partly of common dower, according to the Law of England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her *Muhr misl* or proportionate dower, which, it must be admitted, is but ill defined, being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with. But, whatever the widow may gain in right of dower or jointure, she is not thereby precluded from coming in as one of the heirs, and claiming her indefeasible right of one fourth, when her husband

may have died childless, and of one eighth, when he may have left children. (p. xxvi.)

Guardians are of two descriptions, natural and testamentary: the natural guardians are the father, and father's father, and the paternal relations generally, in proportion to their proximity to succeed to the estate of the minor: the testamentary guardians are the executors of the father and grandfather. The father and grandfather are competent to the office of curator, as well as tutor, or, as they are expressed in the Bengal Code of Regulations, of manager as well as guardian; their executors (being strangers) can act as curators only, and the other paternal relations are tutors only. (p. xxvii.)

From this it would appear that, in providing for the care of minors, the Moohummudan Law partially agrees with the Roman, "committing the care of the minors to him who is the next to succeed the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding, and this they term the *summa providentia*."* With a view, however, to afford some protection to the minor, the law requires that, until he be independent, or, according to the more approved doctrine, until he attain the age of seven years, he should remain in the custody of his mother, and, in her default, in that of some other female relation; and indeed, in the *Hidaya*, in treating of this custody, some danger seems to be apprehended from trusting a minor with one who, though sufficiently near in point of relation to inherit the estate, is not near enough to entertain any very strong affection for his ward. It is stated in page 387, vol. IV. "If there be no woman to whom the right of *hazánit* appertains, and the men of the family dispute it, in this case the nearest paternal relation

* Black, Com. vol. I. p. 461.

has the preference, he being the one to whom the authority of guardian belongs, (the degrees of paternal relationship are treated of in their proper place :) but it is to be observed, that the child must not be entrusted to any relation beyond the prohibited degrees, such as the *Mowlá* or emancipator of a slave, or the son of the paternal uncle, as in this there may be apprehension of treachery." (pp. xxvii, xxviii.)

The rules relative to endowments are worthy of attention. Under the existing regulations, it is true that a check has been put to appropriations of land for pious purposes ; but there still remain many ancient endowments scattered over different parts of India, which the liberality of the British Government has permitted to continue devoted to the purposes designed by their founders. The authority which the state has reserved to itself over these institutions is merely intended for the purposes of preservation, and is consistent with what the Moohummudan Law itself permitted to the ruling power.* (pp. xl, xli.)

The rules relative to debtors, in general, are extremely lenient : perhaps the most prominent instance of this, which can be cited, is the case of several persons contracting a joint obligation in favour of another. As the principles of the Moohummudan Code exactly coincide with those of the Civil Law, I cannot exemplify the rules on the subject more effectually than by extracting the following passage from Pothier: " Solidity may be stipulated in all contracts of whatever kind ; but regularly, it ought to be expressed. If it is not, when several persons have contracted an obligation in favour of another ; each is presumed to have contracted as to his own part. And this is confirmed by *Justinian* in the Novel

* See Prin. Endowments, pp. 69, 70, and 71, and Regulation XIX. 1810, for the due appropriation of the rents and produce of lands granted for the support of mosques, temples, colleges, and other purposes.

(99). The reason is, that the interpretation of obligations is made, in cases of doubt, in favor of debtors, as has been shewn elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjusted that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others : for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido*."* (pp xli, xlii.)

The rules relative to the pursuit of remedies by action do not seem to require particular comment. Superseded as they have been by the Regulations of Government, they are now rather matter of curiosity than utility. Their provisions more nearly assimilate to those of the Civil Law than our own. (p. xlii.)

In compiling the Principles of Law contained in this work, I have had recourse to none but the most approved authorities, and I have appended to this work extracts from the original Arabic, to vouch for the accuracy of the doctrines I have laid down.† I have taken care to note any

* vol. I. page 147.

† I should observe, however, that I purposely avoided consulting books in the first instance, and this I did with a view of avoiding technicalities as much as possible, and where my own knowledge or memory of the law failed me, I generally had recourse to living authorities, referring to books only for the purpose of verification. This will of course occasion considerable dissimilarity in the letter of the rules as they appear in the original and in my compilation ; but their spirit I trust has been uniformly preserved. Another cause of dissimilarity is, that some of the principles here laid down are founded on the absence rather than the existence of rules. For instance, I have laid it down as a principle that there is no distinction between real and personal, nor between ancestral and acquired property in the Moohummudan law of inheritance, and this is deduced from the invariable use in the original Arabic of the word *tarkah*, which includes all descriptions of pro-

material difference of opinion which I have discovered in these authorities. (p. lxxii.)

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perty. The same observation is applicable to the doctrine laid down respecting primogeniture and a few other instances. I have moreover taken the liberty of introducing what I considered more apposite examples on the doctrine of successions, whenever I conceived that an improvement might be made to the illustrations adduced in the *Sirájiyyah* or *Shareefeea*. (p. lxxii.)

PRINCIPLES

OF

MOOHAMMADAN LAW

RELATIVE TO

INHERITANCE, CONTRACTS, AND

MISCELLANEOUS SUBJECTS.

CHAPTER I.

PRINCIPLES OF INHERITANCE.

SECTION I.

General Rules.

1. THERE is no distinction between real and personal, nor between ancestrel and acquired property, in the Moohummudan law of inheritance. — Property of all kinds inheritable without distinction.

2. Primogeniture confers no superior right. All the sons, whatever their number, inherit equally. — Of primogeniture.

3. The share of a daughter is half the share of a son, whenever they inherit together. — Of the right of a daughter, with a son.

4. A will made in favor of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs. — Of legacies in favor of heirs.

5. Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed. — Of debts and legacies.

6. Slavery, homicide, difference of religion, and difference of allegiance, exclude from inheritance. — Causes of exclusion from inheritance.

7. But persons not professing the Moohummudan faith may be heirs to those of their own persuasion; and — Exception.

in the case of persons who are of the Moohummudan faith, difference of allegiance does not exclude from inheritance.

Simultaneous succession of a plurality of heirs.

8. To the estate of a deceased person, a plurality of persons, having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally and partly descend lineally at the same time.

No right by representation.

9. The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B, and C are grandfather, father, and son. The father B dies in the life-time of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A.

Sons, son's sons, &c. have no specific allotments; but their portions vary according to the number of the other heirs.

10. Sons, son's sons, and their lineal descendants, in how low a degree soever, have no specific share assigned to them: the general rule is that they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken by each son. For instance, where there are a father, a mother, a husband, a wife, and daughters, but little remains as the portion of the sons; but where there are no legal sharers nor daughters, the sons take the whole property.

Enumeration of heirs not liable to exclusion.

11. Parents, children, husband, and wife must, in all cases, get shares, whatever may be the number or degree of the other heirs.

General rule for the shares

12. It is a general rule that a brother shall take double the share of a sister. The except ion to it is in

the case of brothers and sisters by the same mother only, but by different fathers. of brothers and sisters.

13. The portions of those who are legal sharers only, and not residuary heirs, can be stated determinately, but the portions receivable by those who are both sharers and residuaries cannot be stated generally, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and under others residuaries, and in the case of fathers and grandfathers who are, under some circumstances, legal sharers only, and, under others, residuaries also, the extent of their portions depends entirely upon the degree of relation of the other heirs and their number.* Of sharers who are not residuary heirs. Of sharers who are residuary heirs.

SECTION II.

Of Sharers and Residuaries.

14. The widow takes an eighth of her husband's estate, where there are children or son's children, how low soever, and a fourth where thre are none. Share of the widow.

15. The husband takes a fourth of his wife's estate, where there are children or son's children, how low soever, and a moiety where there are none. Share of the husband.

16. Where there is no son and there is only one daughter, she takes a moiety of the property as her legal share. Share of the daughter.

* Daughters without sons are legal sharers, and so are sisters without brothers, but with them they become merely residuaries. Grandfathers and fathers, with sons, son's sons, &c. are legal sharers, but, with daughters only, they are residuaries, as well as legal sharers.

Share of two or more daughters.

17. Where there is no son, and there are two or more daughters, they take two-thirds of the property as their legal share.

Share of the son's daughters.

18. Where there is no son, nor daughter, nor son's son, the son's daughters take as the daughters, namely, a moiety is the legal share of one, and two-thirds of two or more.

Of the same.

19. Where there is one daughter, the son's daughters take a sixth; but where there are two or more daughters, they take nothing.

Of the same.

20. Where there is a son's son, however, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great grandson.

Of brothers and sisters.

21. Brothers and sisters can never take any share of the property, where there is a son or son's son, how low soever, or a father or grandfather.*

Of the same.

22. Where there are uterine brothers, the sisters each take a share equal to half of what is taken by the brothers; and they being then residuaries, the amount of their shares varies according to circumstances.

Of the same.

23. In default of sons, son's sons, daughters, and son's daughters, where there is only one sister and no uterine brother, she take s a moiety of the property.

Of the same.

24. In default of sons, son's sons, daughters, and son's daughters, where there are two or more sisters and no uterine brother, they take two-thirds of the property.

* It is the orthodox opinion that the grandfather excludes brethren of the whole blood and those by the same father only. Among the *Shias*, who adhere to the doctrine of the two disciples, the contrary opinion is maintained. The terms "grandfather" and "grandmother" are intended to include all ancestors, in whatever degree of ascent, between whom and the deceased no female intervenes.

Of the same.

25. Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realised their shares; such residue being half, should there be only one daughter or son's daughter, and one-third should there be two or more.

Of half brothers and half sisters. Of those by the same father only. Of those by the same mother only.

26. A distinction is made between the two descriptions of half brothers and half sisters. Half brothers and half sisters, who are by the same father only, can never inherit a half brother's estate while there are both brothers and sisters by the same father and mother, but those by the same mother only, do inherit with brethren of the whole blood.

Of half sisters by the same father only.

27. Where there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares.

Of the same.

28. Where there are two or more sisters by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take nothing.

Of the same.

29. Where, however, the half sisters by the same father only, have an uterine brother, they each take a share equal to half of what is allotted to him.

Brothers and sisters by the same mother only inherit equally; but the general rule of a double share for the male applies to their issue.

30. Among brothers and sisters by the same mother only, difference of sex makes no distinction in the amounts of the shares, contrary to the case of brothers and sisters by the same father and mother, and brothers and sisters by the same father only; but the general rule of a double share to the male applies to their issue.

Of a half brother and a half sister by the same mother.

31. Where there is one brother by the same mother only, or one sister by the same mother only, his or her share is one-sixth, provided there are no children of the deceased, nor son's children, nor father, nor grandfather;

Of two or more.

and where there are two or more children by the same mother only, their share is one-third.

Of the father.

32. Where there is a son of the deceased, or son's son, how low soever, the father will take one- sixth.

Of the mother.

33. Where there are children, or son's children, how low soever, or two or more brothers and sisters, the mother will take one-sixth.

Of the same.

34. Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.

Of the grandfather.

35. Grandfathers can never take any share of the property where there is a father.

Share of.

36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth.

Of the grandmother.

37. Grandmothers can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father.

Of paternal female ancestors.

Exception.

38. Paternal female ancestors of whatever degree of ascent are also excluded by the grandfather, except the father's mother; she not being related through the grandfather.

Share of grandmothers.

39. The share of a maternal grandmother is one-sixth, and the same share belongs to the paternal grandmother where there is no father.

40. Two or three grandmothers, being of equal degree, share the sixth equally. Of two or more grandmothers.

41. But grandmothers, who are nearer in degree to the deceased, exclude those who are more distant. The nearer exclude the more distant.

42. A maternal grandfather and the mother of a maternal grandfather are not entitled to any specific share, they being termed false ancestors, and not included in the number of sharers or residuaries. Of false ancestors.

SECTION III.

Of distant kindred.

43. he claimants are related on the same side; when sides of relation differ, two-thirds go to the paternal, one to the maternal side, without regard to the sexe the claimants.†

51. The same rules apply with regard to the third to the first class of distant kindred; for instance, brother's son's daughter and the sister's daughter's are equidistant in degree from the ancestor; but the mer shall be preferred by reason of the brother's son ing a residuary heir: and where they are equal in respect, the rule laid down for the first class is a cable to this. Of the first class of distant kindred.

* Of the persons here enumerated the following males are legal sharers, namely, the father, the grandfather or other lineal male ancestor, the husband, and the brother of the half blood by the same mother only, and the following females, namely, the daughter, the son's daughter, the widow, the mother, the grandmother, the sister by the same father and mother, the sister by the father only, and the sister by the same mother only. The shares of these persons vary according to circumstances, and, in particular instances, some of them (as has been shown) are liable to exclusion alltogether. The rest of the persons enumerated are residuaries only, and have no specific shares.

Of the second class.

44. In default of all those above enumerated, the grandfathers and grandmothers of that description, who are neither sharers nor residuaries, succeed; and they are termed the second class of distant kindred.

Of the third class.

45. In their default the sister's children, and the brother's daughters, and the sons of the brothers by the same mother only, succeed; and they are termed the third class of distant kindred.

Of the fourth class.

46. In their default the paternal aunts and uncles by the same mother only, and maternal uncles and aunts succeed; and they are termed the fourth class of distant kindred.

Of their children.

34. Where there are no children, nor son's children and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.

Exception in the case of an enfranchised slave.

35. Grandfathers can never take any share of the property where there is a father.

Rules for the succession of the first class.

36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth.

37. Grandmothers can never take any share of the claim through an heir have preference [illegible] claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equidistant in degree from the ancestor; but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir: if there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage of ascent

the distribution will be made with reference to such difference of sex; regard being had to the state at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daugher; because one of the ancestors of the former was a male, whose portion is doudle that of a female.*

For the succession of the second class.

50. The succession also, with regard to the second class of distant kindred, is regulated nearly in the same manner, by proximity, and by the condition and sex of the person through whom the succession is claimed when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one to the maternal side, without regard to the sexes of the claimants.†

For the succession of the third class.

51. The same rules apply with regard to the third as to the first class of distant kindred; for instance, the brother's son's daughter and the sister's daughter's son are equidistant in degree from the ancestor; but the former shall be preferred by reason of the brother's son being a residuary heir: and where they are equal in this respect, the rule laid down for the first class is applicable to this.

* The opinion of *Aboo Yoosuf* is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.

† The rule may be thus exemplified. The claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter. But suppose them to be the father of a maternal grandfather and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same, and they are equal with respect to the sex of the person through whom they claim: and in this case, the only method of making the distribution is by having regard to the sexes of the claimants and by giving a double share to the male.

For the succession of the fourth class.

52. With regard to the fourth class all that need be said is, that (the sides of relation being equal) uncles and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only are preferred to those by the same mother only. Where the strength of relation is also equal, as, for instance, where the claimants are a maternal uncle and a maternal aunt of the whole blood, then the rule is, that the male shall have a share double that of the female. Where however one claimant is related through the father only, and the other is related through the mother only, the claimant related through the father shall exclude the other if the sides of their relation are the same; for instance, a maternal aunt by the same father only will exclude a maternal aunt by the same mother only; but if the sides of their relation differ; for instance, if one of the claimants be a paternal aunt by the same father and mother, and the other be a maternal aunt by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.

For the succession of their children.

53. The succession of the children of the above class, that is, the cousins, is regulated by the following rules:—propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one not being an heir, without respect to the sex of the claimants; for instance, the daughter of a paternal uncle succeeds in preference to the son of a paternal aunt—unless the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt by the same father and mother, and the son of a maternal aunt by the same father and mother, or by the same father only, claim

76. The second is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mooluwafiq*, or composit; as in the case of a father, a mother, and ten daughters. Here according to principle 61, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composit, or agree in two. In this case the rule is, that half the number of such heirs, which is 5, must be multiplied into the number of the original division 6, thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or two each. Second principle.

77. The third is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of such heirs, and the number of shares remaining for them. This is termed *mootubayun*, or prime, as in the case of a father, a mother, and five daughters. Here also according to principle 61 above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be *mootubayun*, or prime. In this case the rule is, that the whole Third principle.

number of such heirs, which is five, must be multiplied into the number of the original division. Thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or four each.

Fourth principle.

78. The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are *mootumasil*, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case according to principle 61, the division must be by six. Here in the first instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is 4, and 4 compared with the number of daughters 6, is *mootuwafiq*, or composit, agreeing in two. The share of the three grandmothers is one sixth, but one sixth of six is 1, and 1 compared with the number of grandmothers is *mootubayun*, or prime. The remaining share, which is one, will devolve on the three paternal uncles; but one compared with three is also *mootubayun*, or prime.

Then the rule is, that the sets of heirs themselves must be compared with each other, by the whole where it appears that they were *mootudakhil*, or concordant; or *mootubayun*, or prime; and by the measure where it appears that they were *mootuwafiq*, or composite, and, if agreeing in two by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose cases the comparison showed a prime result. Thus $3 = 3$ and $3 = 3$, which being *mootumasil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original division. Thus $3 \times 6 = 18$, of

which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each; and the paternal uncles will take the remaining three, or one each.

79. The fifth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portion without a fraction, and that the sets are *mootudakhil*, or concordant; as in the case of 4 wives, 3 grandmothers, and 12 paternal uncles. In this case, according to principle 65, the division must be by twelve. Here, in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is 3, and 3 compared with the number of wives is *mootubayun*, or prime. The share of the three grandmothers is one sixth; but the sixth of twelve is 2, and 2 compared with the number of grandmothers is also prime. Fifth principle.

The remaining shares, which are seven, will devolve on the twelve paternal uncles; but 7 compared with 12 is also prime.

Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime, on a comparison of the several heirs with their respective shares. Thus $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied into the number of the original division. Thus $12 \times 12 = 144$; of which the wives will get (one-fourth) thirty-six, or nine each, the grandmothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each.

80. The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get Sixth principle.

their portions without a fraction, and that some of the sets are *mootuwafiq*, or composit, with each other ; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles ; in which case, according to principle 66, the original division must be by 24. Here, in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth, but an eighth of 24 is 3, and three compared with the number of wives is *mootubayun*, or prime. The share of the eighteen daughters is two-thirds ; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is one-sixth ; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries ; but one and six are prime.

Then the rule is, that the sets of heirs themselves must be compared ; by the whole, where the preceding result shows that they were prime, and by their measure, where it shows that they were composit. Thus $4 \times 2 = 9 - 1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set ; because the preceding result shows that set to have been prime. Thus $15 \times 2 = 36 - 6$, and $6 = 15 - 9$, and $6 = 9 - 3$, which agreeing in 3, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set ; because the preceding result shows that set to have been prime. Thus $6 \times 30 = 180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this

result must be multiplied into the number of the original division. Thus $180 \times 24 = 4320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.

Seventh principle.

81. The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mootubayun*, or prime, and no one of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here, according to principle 66, the original division must be by 24.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one eighth; but the eighth of 24 is 3, and 3 compared with the number of wives is prime. The share of the six female ancestors is one sixth; but the sixth of 24 is 4, and 4 compared with the number of female ancestors is composit, or agrees in 2. The share of the ten daughters is two-thirds; and two-thirds of 24 is 16, and 16 compared with the number of daughters is also composit, or agrees in 2. The remaining share, which is one, will devolve on the seven paternal uncles; but 1 and 7 are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by the half or other measure, where it shows that they were composit. Agreeably to this rule the whole of the first set of heirs must be compared with half of the second: thus 2—3—1, which numbers being prime must be multiplied into each

other. Then the result must be compared with the half of the next set, the former result here also having agreed in 2. Thus 5=6—1, which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus $7 \times 4 = 30 - 2$ and $2 \times 3 = 7 - 1$, which being also prime, must be multiplied into each other. Thus $30 \times 7 = 210$, in which case the rule is, that this last product must be mutiplied into the number of the original division. Thus $210 \times 24 = 5040$, of which the wives will take an eighth, six hundred and thirty, or three hundred and fifteen each; the female ancestors a sixth, eight hundred and forty, or one hundred and forty each; the daughters two-thirds, three thousand three hnndred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.

Rule for ascertaining the shares of different sets of heirs.

82. When the whole number of shares, into which an estate should be made, has been found, the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned. There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds, the estate, according to principle 66, must be made originally into 24 parts, of which the widow is entitled to 3, the daughters to 16, and there remain 5 to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction, must be ascertained, and 4=5—1, being prime, the rule is, (see No. 77,) to multiply the number of the original

division by the whole number of the heirs so situated. Thus $24 \times 4 = 96$. Here, to find the shares of each set, multiply what each was originally declared entitled to, by the number by which the aggregate of all the original portions was multiplied. Thus $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles.

Rule for ascertaining the shares of each individual of the different sets of heirs.

83. To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus $8 \times 8 = 64$, and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six.

SECTION VI.

Of Exclusion from and partial Surrender of Inheritance.

Two descriptions of exclusion.

84. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications enumerated in principle (6), or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance.

Explanation of.

In what case an entirely excluded heir partially excludes others.

85. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs, either entirely or partially; but those who are excluded by reason of some intervening heir, do in some instances partially exclude others.

Example.

86. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only have been entitled to a sixth, although the sisters, who partially exclude her, are themselves entirely excluded by reason of the intervention of the father.

Rules where one of the heirs makes a partial surrender of his right.

87. If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here according to principle 64, the property must be made into six shares; of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now supposing the estate left to amount to six lacks of rupees, and the husband to content himself with two, still as far as affects the mother, the division must be made as if he had been a party and of the remaining four lacks the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lacks as her legal share, and the remainder would go to the uncle as residuary.

SECTION VII.

Of the Increase.

Definition of the increase.

88. The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.

89. It takes effect in three cases; either when the estate should be made into six shares, or when it should be made into twelve, or when it should be made into twenty-four. See principles (67, 68, 69). One example will suffice.

Cases in which it takes effect.

90. A woman leaves a husband, a daughter, and both parents. Here the property should be made into twelve parts, of which, after the husband has taken his fourth or three, and the parents have taken their two-sixths or four, there remain only five shares for the daughter, instead of six, or the moiety to which by law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realize six shares of the property.

Example of.

SECTION VIII.

Of the Return.

91. The return is where, there being no residuaries, the surplus, after the distribution of the shares, returns to the sharers, and the doctrine of it is as follows.

Deinfition of the return.

92. It takes effect in four cases; first, where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of the two daugthers, or two sisters; in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally.

Circumstances under which it takes effect.

First case example of.

93. Secondly, where there are two or more classes of sharers, unassociated with those not entitled to claim the return, as in the instance of a mother and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accord-

Second case example of.

ingly. Thus the mother's share being one sixth, and the two daughters' share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

Third case example of.

94. Thirdly, when there is only one class of sharers, associated with those not entitled to claim the return, as in the instance of three daughters and a husband; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return his share of the inheritance, (which is in this case four), and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return; but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters, (three not being capable of division among six), the proportion must be ascertained between the shares and sharers. Thus $3 \times 2 = 6$, which agreeing in three, the rule is, that the number 4, into which the estate was intended to be distributed, must be multipled by 2, that is, the measure or a third of the number of those entitled to the return. Thus $4 \times 2 = 8$, of which the husband will take two, and the daughters six or one each; and if, on a comparsion as above, the result should be prime, as in the case of a husband and five daughters, the number 4, into which it was intended to distribute the estate, must be multiplied by 5, or the whole of the number of those entitled to a return. Thus $4 \times 5 = 20$, of which the husband will take five, and the daughters fifteen or three each.

Fourth case example of.

95. Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return, as in the instance of a widow, four paternal grandmothers, and six sisters by the same mother only;

in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance, (which is in this case four.) Then, after the widow has taken her share, there remain three to be divided among the grandmothers and half sisters ; but the share of the grandmothers is one-sixth, and of the half sisters one-third, and here, to give them their portions, the remainder should be made into six ; but a third and a sixth of this number, amount to three, which agrees with the number to be divided among them ; of which the half sisters will take two, and the grandmothers one. Had there been only one grandmother, and only two half sisters, there would have been no necessity for any further process, as the grandmother would have taken one-third, and the two half sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half sisters, nor one among the four paternal grandmothers, without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $2 \times 3 = 6$, which being composit or agreeing in two, and $1 \times 3 = 4 - 1$, which being prime, the whole of one set of sharers must be compared with the half of the other. Thus $3 = 4 - 1$, which also being prime, one of the numbers must be multiplied by the other. Thus $3 \times 4 = 12$; and having found this number it must be multiplied into that of the original division. Thus $4 \times 12 = 48$, of which the grandmothers will get 12 or three each, 12 being to 48 as 1 to 4, and the half sisters 24 or 4 each, 24 being to 48 as 2 to 4, and the widow will take the remaining twelve. It is different

if the shares of the persons entitled to a return, do not agree with the number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grandmothers. Here the property must in the first instance be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided among the daughters, and the grandmothers; but the share of the grandmothers is one-sixth, and of the daughters two-thirds; and here, to give them their portions, the property divisible among them should be made into six parts; but a sixth and two-thirds of this number amount to 5, which disagrees with the number to be divided among them; in which case the rule is, that the number of shares of those entitled to a return, must be multiplied by the number into which it was necessary to make the property originally. Thus $8 \times 5 = 40$, of which the widow will take 5, the daughters will take 28, and the grandmothers 7. But it is obvious, that 28 cannot be distributed among the nine daughters, nor 7 among the six paternal grandmothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $9 \times 3 = 28 - 1$, and $6 = 7 - 1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus $6 = 9 - 3$, which being concordant or agreeing in 3, the rule is, that the third of one of the numbers must be multiplied into the whole of the other. Thus $3 \times 6 = 18$; and having found this number, it must be multiplied

into that of the preceding result. Thus $40 \times 18 = 720$, of which the daughters will get 504 or 56 each, 504 being to 720 as 28 to 40; the grandmothers will get 126 or 21 each, 126 being to 720 as 7 to 40; and the widow will get the remaining ninety.

SECTION IX.

Of Vested Inheritances.

Definition of vested inheritances.

96. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly.

Rules in case of.

Ditto.

97. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs.

Ditto.

98. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of the shares into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one.

Ditto.

99. If the proportion should be concordant, or composit, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is

necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding distribution.

Example of. 100. For instance, a man dies leaving A, his wife, B and C, his two sons, and D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate. Thus $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one;

but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions, (five at the second and forty-two at the first.) Thus $10 \times 4 = 47 - 7$, and $7 = 10 - 3$, and $3 = 7 - 4$, and $3 = 4 - 1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2883$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore of the 2880 shares, the son B will get $840 + 100 + 94 = 1034$; the son C $840 + 100 + 94 = 1034$; the daughter E $420 + 50 + 47 = 517$; the mother of A 60, and the husband of D 235.

SECTION X.

Of Missing Persons and Posthumous Children.

Of missing persons

101. The property of a missing person is kept in abeyance for ninety years. His estate in this interval cannot derive any accession from the intermediate death of others, nor can any person who dies during this interval inherit from him.

Of a missing person being a coheir with others.

102. If a missing person be a coheir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the

case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case the daughters will take half the estate immediately, as that must be their share at all events; but the grand-children will not take any thing, as they are precluded on the supposition of their father's being alive.

Of a child in the womb, there being sons.

103 Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.

Of a child in the womb, there being heirs who would succeed only on its default.

104. Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child, (as would be the case, for instance, with a brother or sister), no immediate distribution of the property takes place.

Of the same, there being heirs who would take at all events.

105. But if those other relatives would succeed at all events to some portion, (larger without than with a child, as would be the case, for instance, with a mother,) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third.

SECTION XI.

De Commorientibus.

Rule of succession, where two or more individuals meet with a sudden death at the same time.

106. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the inter-

mediate heirs who died at the same time with the original proprietor had never existed.*

SECTION XII.

Of the Distribution of Assets.

Of claims and assets.

107 What has preceded relates to the ascertainment of the shares to which the several heirs are *entitled*; but when the proper number of shares into which an estate should be made, may have been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, if would seldom happen that the assets exactly amount in value to ten or fifty goldmohurs or rupees. To ascertain the proper shares of the different sets of heirs and creditors in such cases, the following rules are laid down:

* The following case may be cited as an example of this rule. A, B, and C, are grandfather, father, and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognizes no right by representation, and sons exclude grandsons. Mr. Christian, in a note to Blackstone's Commentaries, (vol. 2. page 516,) notices a curious question that was agitated some time ago, where it was contended, that when a parent and child perish together, and the priority of their deaths is unknown, it was a rule of the civil law to presume that the child survives the parent. He proceeds however to say: "But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. Some curious cases *de commorientibus* may be seen in Causes Celebres, 3 tome, 412 et seq. in one of which, where a father and son were slain together in battle and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father."

Rules for apportioning them.

108. When the number of shares has been found into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of the assets. If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be multiplied into the number of the assets, and the result divided by the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain what shares of the estate left, these heirs are entitled to, the above rule must be observed. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{24}$, and $400 \div 24 = 16\frac{16}{24}$, and $125 \div 24 = 5\frac{5}{24}$.

Where the numbers are prime.

Ditto where they are composit

109. If the numbers are composit, the rule is that the share of each set of heirs must be multiplied into the measure of the number of the assets and the result divided by the measure of the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above and property to the amount of 50 rupees. Now as 24 and 50 agree in 2 the measure of both numbers is half. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$, but $75 \div 12 = 6\frac{3}{12}$, and $400 - 12 = 33\frac{4}{12}$, and $125 \div 12 = 10\frac{5}{12}$.

And of individual heirs.

110. If it be desired to ascertain the number of shares of the assets of which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above.

For instance, in the above case the original share of each daughter was 8, and $8 \times 25 = 200$, and $200 - 12 = 16\frac{8}{12}$.

And of creditors.

III. In a distribution of assets among creditors the rule is, that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in principle (109), it will be found that the creditor to whom the debt of 16 rupees was due, is entitled to 14 rupees, the creditor of 5 rupees to 4 rupees 6 annas, and the creditor of 3 rupees to 2 rupees 10 annas.

SECTION XII.

Of Partition.

Property where conveniently partible should be distributed among the heirs at the desire of one or more.

112. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also where one heir claims it, provided the property admit of separation without detriment to its utility.

In other cases the distribution should not take place without the consent of all.

113. But where the property cannot be separated without detriment to its several parts, the consent of all the coheirs is requisite; so also where the estate consists of articles of different species.

Mode of distribution.

114. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the coheirs; each share should be appraised, and then recourse should be had to drawing of lots.

Of partition by usufruct.

115. Another common method of partition is by usufruct, where each heir enjoys the use or the profits of the property by rotation; but this method is subordinate to actual partition; and where one coheir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases.

CHAPTER II.

Of Inheritance according to the Imameeya, or Schia doctrine.

Three sources of the right of inheritance.

I. According to the tenets of this Sect, the right of inheritance proceeds from three different sources.

Enumeration of them.

2. First, it accrues by virtue of consanguinity. Secondly, by virtue of marriage. Thirdly, by virtue of *Willa*.*

Heirs by consanguinity consist of three degrees.

3. There are three degrees of heirs who succeed by virtue of consanguinity; and so long as there is any one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit.

Enumeration of heirs of the first degree.

4. The first degree comprises the parents, and the children, and grand children, how low in descent soever, the nearer of whom exclude the more distant. Both parents, or one of them inherit together with a child, a grandchild, or a great grandchild; but a grandchild

Their relative rights.

* In a note to his translation of the *Hedaya*, Mr. Hamilton observes that "there is no single word in our language fully expressive of this term. The shortest definition of it is, the relation between the master (or patron) and his freedman" But even this does not express the whole meaning. Had he proceeded to state "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.

does not inherit together with a child, nor a great grandchild together with a grandchild.

5. This degree is divided into two classes; the roots which are limited, and the branches which are unlimited. The former are the parents who are not represented by their parents; the latter are the children who are represented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity. Subdivision of.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife. Of coheirs with children.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent. Of the sons' and daughters' offspring.

8. The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. The great grandfather cannot inherit together with a grandfather or a grandmother; and the son of a brother cannot inherit with a brother or a sister; and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister. Of the second degree. Their relative rights.

9. This degree again is divided into two classes; the grand parents and other ancestors, and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line, may be extended *ad infinitum*. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other, in proportion to their proximity. Subdivision of.

Of the third degree.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a paternal uncle cannot inherit with a paternal uncle or a paternal aunt, nor the son of a maternal uncle with a maternal uncle or a maternal aunt.

Their relative rights.

Additional rules.

11. This degree is unlimited in the ascending and descending line, and their representatives may be extended *ad infinitum;* but so long as there is a single aunt or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only, is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Enumeration of other heirs, of the third degree.

12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed: and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand parents and great grand parents inherit, according to their degree of proximity to the deceased.*

* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law for taking out letters of administration: "In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews, (and the females of each class respectively,) and lastly, cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate." Blackstone's Commentaries, vol. 2. page 504.

13. It is a general rule that the individuals of the whole blood exclude those of the half blood, who are of the same rank; but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half blood: a son of the brother of the whole blood, however, does not exclude a brother of the half blood, because they belong to different ranks: but he would exclude the son of a half brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half blood, though he does an uncle of the half blood.

General rule relative to the half and whole blood.

Example.

Exception.

14. The principle of the whole blood excluding the half blood, is confined also to the same rank, among collaterals: for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half blood; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half blood by the same father only, the latter of whom is excluded by the former.

Additional rules.

Exception.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased; for instance, a paternal uncle or aunt of the whole blood, does not exclude a maternal uncle or aunt of the half blood; but a paternal uncle or aunt of the whole blood, excludes a paternal uncle or aunt of the half blood; and so likewise a maternal uncle or aunt of the whole blood, excludes a maternal uncle or aunt of the half blood.

Additional rule where the sides of relation differ.

and where they are the same.

16. If a man leave a paternal uncle of the half blood, and a maternal aunt of the whole blood, the former will take two-thirds, in virtue of his claiming through the father, and the latter one-third, in virtue of her claiming

Additional rule where the sides differ.

through the mother; as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt.

Further exception relative to the exclusion of the half blood.

17. The general rule, that those related by the same father and mother, exclude those who are related by the same mother only, does not operate in the case of individuals to whom a legal share has been assigned.

Of uterine and half sisters.

18. If a man leave a whole sister, and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole sister; and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

Rule in case of a double relation.

19. Where there are two heirs, one of whom stands in a double relation: for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle,* the former will take one-third, and the latter two-thirds, and he will be further entitled to take one half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth.

Of claimants by marriage.

20. Secondly, those who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case; and their shares are half for the husband, and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.

* The relation of paternal and maternal uncle may exist in the same person in the following manner. A having a son C by another wife, marries B having a son D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half brother by the same father, and a half sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

Of the succession of husband and wife.

21. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies, leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury.

Rule in case of marriage not consummated.

22. If a sick man marry and die of that sickness, without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him, under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness.

Rule in case of divorce on deathbed.

23. If a man on his deathbed divorce his wife, she shall inherit, provided he died of that sickness within one year from the period of divorce; but not if he lived for upwards of a year.

And of reversible divorce.

24. In case of a reversible divorce, if the husband die within the period of the wife's probation, or if she die within that period, they have a mutual right to inherit each other's property.

And of irregular marriage.

25. The wife by an usufructuary, or temporary marriage, has no title to inherit.*

Of claimants by *willa*.

26. Thirdly, those who succeed in virtue of *Willa*; but they never can inherit so long as there is any claimant by consanguinity or marriage.

Two descriptions of.

27. *Willa* is of two descriptions; that which is derived from manumission, where the emancipator by such act derives a right of inheritance; and that which de-

* This species of contract is reprobated by the orthodox sect, and they are by both considered wholly illegal. See Hamilton's *Hedaya*, vol. I, pages 71 and 72.

pends on mutual compact, where two persons reciprocally engage, each to be heir of the other.

The first preferred.

28. Claimants under the latter title are excluded by claimants under the former.

General rules of exclusion.

29. The general rules of exclusion, according to this sect, are similar to those contained in the orthodox doctrine; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son, and a maternal uncle excludes a paternal grand uncle; whereas, according to the orthodox doctrine in such cases, the daughter would only get half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

Difference of allegiance does not exclude, nor homicide, unless wilful.

30. Difference of allegiance is no bar to inheritance, and homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide, to disqualify, must have been of *malice prepense*.

The doctrine of the increase not admitted.

31. The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case, a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter, and parents. Here the property must be divided into twelve, of which the husband is entitled to three or a fourth; the parents to two-sixths or four, and the daughter to half; but there only remain five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts to give the daughter her six shares; but, according to the *Imameeya* tenets, the daughter must be content with the five shares that

Example.

remain, because in certain cases her right as a legal sharer is liable to extinction; for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

Of the return.

32. Where the assets exceed the number of heirs, the surplus reverts to the heirs. The husband is entitled to share in the return; but not the wife. The mother also is not entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual.

Privilege of primogeniture.

33. On a distribution of the estate, the elder son, if he be worthy, is entitled to his father's sword, his *Koran*, his wearing apparel, and his ring.*

CHAPTER III.

Of Sale.

Definition of sale.

1. Sale is defined to be a mutual and voluntary exchange of property for property.

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* In the foregoing summary I am not aware that I have omitted any point of material importance. The legal shares allotted to the several heirs are of course the same as those prescribed in the *Soonnee* Code, both having the precepts of the *Koran* as their guide. The rules of distribution and of ascertaining the relative shares of the different claimants are also (*mutatis mutandis*) the same. It is not worth while to notice in this compilation the doctrines of the *Imameeya* sect on the law of contracts or their tenets in miscellaneous matters. A Digest of their laws, relative to those subjects, was some time ago prepared and a considerable part of it translated by an eminent Orientalist (Colonel John Baillie,) by whom however it was left unfinished, probably from an opinion that the utility of the undertaking might not be commensurate to the time and labour employed upon it.

How effected.

2. Contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery.

Four kinds of.

3. Sale is of four kinds; consisting of commutation of goods for goods: of money for money: of money for goods: and of goods for money; which last is the most ordinary species of this kind of contract.

Four denominations of.

4. Sales are either absolute, or conditional, or imperfect, or void.

Of an absolute sale.

5. An absolute sale is that which takes effect immediately; there being no legal impediment.

Of a conditional sale.

6. A conditional sale is that which is suspended on the consent of the proprietor, or (where he is a minor) on the consent of his guardian, in which there is no legal impediment, and no condition requisite to its completion but such consent.

Of an imperfect sale.

7. An imperfect sale is that which takes effect on seisin; the legal defect being cured by such seisin.

Of a void sale.

8. A void sale is that which can never take effect; in which the articles opposed to each other, or one of them, not bearing any legal value, the contract is nude.

Of the consideration.

9. The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon; and property may be sold for prime cost, or for more, or for less than prime cost.

Of the parties.

10. It is requisite that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father or a guardian makes a sale on behalf of a minor, or where a slave purchases his own freedom by permission of his master.

Who may contract.

11. It is sufficient that the parties have a sense of the obligation they contract; and a minor, with the consent of his guardian, or a lunatic in his lucid intervals, may be contracting parties.

Postponing payment illegal. Exception.

12. In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money for goods, or of goods for money, such stipulation is authorised.

Certainty requisite.

13. It is essential to the validity of every contract of sale, that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties.

Other requisite conditions.

14. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period.

Equality when requisite.

15. In a commutation of money for money, or of goods for goods, if the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition.

Illegal conditions. Exception.

16. It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.

Of option.

17. It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days.

Payment how deferrible.

18. When payment is deferred to a future period, it must be determinate, and cannot be suspended on an event, the time of the concurrence of which is uncertain, though its concurrence be inevitable. For instance, it is not lawful to suspend payment until the wind shall blow, or until it shall rain, nor is it lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term; for instance, it is not lawful to suspend payment until the sowing or reaping time.

Sale of a debt.

19. It is not lawful to sell property in exchange for a debt due from a third person, though it is for a debt due from the seller.

Resale of personal property.

20. A resale of personal property cannot be made by the purchaser, until the property shall actually have come into his possession.

Warranty implied.

21. A warranty as to freedom from defect and blemish, is implied in every contract of sale.

Where the property differs from the description.

22. Where the property sold differs, either with respect to quantity or quality, from what the seller had described it, the purchaser is at liberty to recede from the contract.

Sale of land.

23. By the sale of land nothing there on, which is of a transitory nature, passes. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land.

Responsibility in case of option.

24. Where an option of dissolving the contract has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price* agreed upon; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property.

Option how annulled.

25. But the condition of option is annulled by the purchaser's exercising any act of ownership, such as to take the property out of *statu quo*.

Option to purchasers of unseen property.

26. Where the property has not been seen by the purchaser, nor a sample, (where a sample suffices,) he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even though no option may have been stipulated.

Exception.

No option to sellers.

27. But though the property have not been seen by the seller, he is not at liberty to recede from the contract

(except in sale of goods for goods) where no option was stipulated. Exception.

28. A purchaser, who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect, of which he was not aware at the time of the purchase, unless, while in the hands of the purchaser, it received a further blemish; in which case he is only entitled to compensation. Option on discovering a defect. Exception.

29 But if the purchaser have sold such faulty article to a third person, he cannot exact compensation from the original seller; unless, by having made an addition to the article prior to the sale, he was precluded from returning it to the original seller. Rule in case of resale. Exception.

30. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the fact of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportional compensation. Cases in which restitution may be demanded. And compensation only.

31. If a person sell an article which he had purchased, and be compelled to receive back such article and to refund the purchase money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature. The first purchaser is on a footing with the second. Proviso.

32. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article or attempt to remove the defect, he shall have no remedy against the seller, (unless there may have been some special clause in the contract); such act on his part implying acquiescence. Remedy against the seller how lost.

33. It is a general rule that, if the articles sold are of such nature as not easily to admit of separation or General rules for the right of restitution.

division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.

And that of compensation.

Illegal practices.

34. The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of prayer, are all prohibited, though they are valid.

CHAPTER IV.

Of Shoofaa, or Pre-emption.

Definition of pre-emption.

1. *Shoofaa*, or the right of pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser.

With respect to what property it does and to what it does not take effect.

2. The right of re-pemption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated.

Additional rules.

3. The right of pre-emption takes effect with regard to property, whether divisible or indivisible; but it does not apply to movable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned.

Not restricted to any particular class.

4. The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion.

Rights and privileges of.

5. All rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption.

Who may claim pre-emption.

6. The following persons may claim the right of pre-emption in the order enumerated: a partner in the property sold, a participator in its appendages, and a neighbour.

Necessary forms to be observed.

7. It is necessary that the person claiming this right, should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witness, of such his intention, either in the presence of the seller, or of the purchaser, or on the premises.

Claim when preferrible.

8. The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a court of justice.*

Rights of first purchaser.

9. The first purchaser has a right to retain the property until he has received the purchase money from

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* Much difference of opinion prevails as to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature; otherwise a purchaser may be kept in a continual state of suspense. *Ziffer* and *Moohummud* are of opinion, (and such also is the doctrine according to one tradition of *Aboo Yoosuf*, that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right; but according to *Aboo Huneefa*, and another tradition of *Aboo Yoosuf*, there is no limitation as to time. This doctrine is maintained in *Futawai Aulumgeeree*, in the *Moheetoo Surukhsee*, and in the *Hedaya*; and it seems to be the most authentic, and generally prevalent opinion. But the compiler of the *Futawai Aulumgeeree* admits that decisions are given both ways.

the claimant by pre-emption, and so also the seller in a case where delivery may not have been made.

Rules where the property has undergone alteration while in the possession of the first purchaser.

10. Where an intermediate purchaser has made any improvements in the property, the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.

Rules where the property has been improved by the claimant by pre-emption, and it appear to belong to a third person.

11. But a claimant by pre-emption, having obtained possession of, and made improvements in, property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller or from the intermediate purchaser, (if possession had been given,) and he is at liberty to remove his improvemeuts.

Where there is a dispute as to the price paid.

12. Where there is a dispute between the claimant by pre-emption and the purchaser, as to the price paid, and neither party have evidence, the assertion, on oath, of the purchaser must be credited; but where both parties have evidence, that of the claimant by pre-emption should be received in preference.

Legal devices by which a claim of pre-emption may be evaded.

13. There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property, with the exception of that part immediately bordering on his neighbour's, and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and

afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation.

CHAPTER. V.

Of Gifts.

Definition of gift.

1. A gift is defined to be the conferring of property without a consideration.

Essential conditions of.

2. Acceptance and seisin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

Cannot be made to take effect *in futuro*

3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period.

Delivery and seisin requisite.

4. It is requisite that a gift should be accompanied by delivery of possession, and that seisin should take effect immediately, or, if at a subsequent period, by desire of the donor.

The thing given must be actually existing at the time.

5. A gift cannot be made of any thing to be produced *in futuro*; although the means of its production may be in the possession of the donee. The subject of the gift must be actually in existence at the time of the donation.

An undefined gift of divisible property not valid.

6. The gift of property which is undivided, and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previously to delivery; for delivery of the gift cannot in that case be made without including something which forms no part of the gift.

Ruless in case of two or more donees.

7. In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery.

A gift must be express, and must be entirely relinquished by the donor.

8. A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

Exceptions.

9. The cases of a house given to a husband by a wife, and of property given by a father to his minor child, form exceptions to the above rule.

Of seisin by proxy.

10. Formal delivery and seisin are not necessary in the case of a gift to a trustee, having the custody of the article given, nor in the case of a gift to a minor. The seisin of the guardian in the latter case is sufficient.

Of gift on a death-bed.

11. A gift on a death-bed is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently no person can make a gift of any part of his property on his death-bed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest.

Resumption admissible.

12. A donor is at liberty to resume his gift, except in the following instances:

Except in certain cases.

13. A gift cannot be resumed where the donee is a relation, nor where any thing has been received in return, nor where it has received any accession, nor where it has come into the possession of a second donee, or into that of the heirs of the first.

Two peculiar kinds of gift.

14. Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which however more nearly resemble exchange or sale. They are technically termed *Hiba bil Iwuz*, mutual gift, or gift for a consideration, and *Hiba ba shurt ool Iwuz*, gift on stipulation, or on promise of a consideration.

Of *Hiba bil Iwuz*.

15. *Hiba bil Iwuz* is said to resemble a sale in all its properties; the same conditions attach to it, and the mutual seisin of the donees is not, in all cases, necessary.

16. *Hiba ba shurt ool Iwuz*, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seisin of the donor and donee is therefore a requisite condition. Of *Hiba ba shurt ool Iwuz.*

CHAPTER VI.

Of Wills.

1. There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property which is the subject of the will be real or personal. Nuncupative and real wills equally valid.

2. Legacies cannot be made to a larger amount than one-third of the testator's estate, without the consent of the heirs. Of legacies.

3. A legacy cannot be left to one of the heirs without the consent of the rest. To an heir.

4. There is this difference obetween the property which is the subject of inheritance and that which is the subject of legacy. The former becomes the property of the heir by the mere operation of law; the latter does not become the property of the legatee until his consent shall have been obtained either expressly or impliedly. Distinction between property acquired by inheritance and by will.

5. The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance. Legacies precede claims of inheritance.

6. All the debts due by the testator must be liquidated before the legacies can be claimed. And debts precede legacies.

7. An acknowledgment of debt in favour of an heir on a deathbed resembles a legacy; inasmuch as it does not avail for more than a third of the estate. Acknowledgment of a debt to an heir.

8. It is not necessary that the subject of the legacy should exist at the time of the execution of the will. Of the subject of a

It is sufficient for its validity that it should be in existence at the time of the death of the testator.

Of illegal provisions.

9. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law.

Special rule relative to legatees.

10. A person not being an heir at the time of the execution of the will, but becoming one previously to the testator's death, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will.

A legacy may be retracted by implication.

11. If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annuled; so also if he sell or give the legacy to any other individual; even though it may have reverted to his possession before his death, as these acts amount to a retractation of the legacy.

Rules in case of excessive legacies.

12. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportional abatement must be made in all the legacies.

And of different legacies to the same person.

13. Where a legacy is left to an individual, and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect.

And of the same legacy to two individuals.

14. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will only get half, and the remaining moiety will devolve on the heirs; so also in the case of an heir and a stranger being left joint le-

15. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors. Of executors.

16. A Moohummudan should not appoint a person of a different persuasion to be his executor, and such appointment is liable to be annulled by the ruling power. Should be *Moohummudans*.

17. Executors having once accepted cannot subsequently decline the trust. Cannot resign.

18. Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, and where benefit to the estate must certainly accrue. Rule where there are two.

CHAPTER VII.

Of Marriage, Dower, Divorce, and Parentage.

1. Marriage is defined to be a contract founded on the intention of legalizing generation. Definition of marriage.

2. Proposal and consent are essential to a contract of marriage. Essentials of.

3. The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio*; for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions, the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also a condition, that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract; and that the proposal and acceptance should be made at the same time and place. Conditions of.

4. There are only four requisites to the competency of witnesses to a marriage contract; namely, freedom, Competency of witnesses to.

discretion, puberty, and profession of the Moosulmaun faith.

Special rules regarding them.

5. Objections as to character and relation, do not apply to witnesses in a contract of marriage, as they do in other contracts.

Proposal may be made by agency, or by letter.

6. A proposal may be made by means of agency, or by letter; provided there are witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it was addressed.

Effect of the contract.

7. The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance,* and habitation; to create, betwen the parties, prohibited degrees of relation and reciprocal rights of inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife; and to invest the husband with a power of correction in cases of disobedience.

Number of wives.

8. A free-man may have four wives, but a slave can have two only.

Enumeration of prohibited relations.

9. A man may not marry his mother, nor his grandmother, nor his mother-in-law, nor his step-mother, nor his step-grand-mother, nor his daughter, nor his grand-daughter, nor his daughter-in-law, nor his grand-daughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse.

* The right of a wife to maintenance is expressly recognized; so much so, that if the husband be absent and have not made any provision for his wife, the law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

Additional prohibitions.

10. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as that, if one of them had been a male, they could not have intermarried.

Of freemen and slaves.

11. Marriage cannot be contracted with a person who is the slave of the party, but the union of a freeman with a slave, not being his property, with the consent of the master of such slave, is admissible; provided he be not already married to a free woman.

Of the religion of the parties.

12. Christians, Jews, and persons of other religions, believing in one God, may be espoused by *Moohummudans.*

Presumption of marriage.

13. Marriage will be presumed, in a case of proved continual cohabitation, without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at all nuptials.

Capacity to contract.

14. A woman, having attained the age of puberty, may contract herself in marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be equal.

Right of guardians.

15. If the match be unequal, the guardians have a right to interfere with a view to set it aside.

Where an infant contracts.

16. A female, not having attained the age of puberty, cannot lawfully contract herself in marriage without the consent of her guardians, and the validity of the contract entirely depends upon such consent.

Limitation.

17. But in both the preceding cases the guardians should interfere before the birth of issue.

Contract when dissoluble by the parties.

18. A contract of marriage entered into by a father or grandfather, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay

does not take place as may be construed into acquiescence.

Of guardians for marriages.

19. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians the government may supply their place.

Of dower.

20. A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but

Minimum of.

the minimum is ten *dirms*,* and it becomes due on the

When due.

consummation of the marriage, (though it is usual to stipulate for delay as to the payment of a part,) or on the death of either party, or on divorce.

Where no amount fixed.

21. Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family.

Whether prompt or deferred.

22. Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand.

Disqualification of fosterage and consanguinity.

23. It is a rule that whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance a man

Exceptions.

may marry his sister's foster-mother, or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister.

Of the rules of divorce.

24. A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause; but before the divorce becomes irreversible, according to the more approved doctrine, it must be repeated three

* The value of the *dirm* is very uncertain. Ten *dirms* according to one account make about six shillings and eight pence sterling. See Note to Hamilton's translation of the *Hidaya*, page 122, volume I.

times, and between each time the period of one month must have intervened; and in the interval he may take her back either in an express or implied manner.

Conditions precedent to re-union.

25. A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual and separated from him either by death or divorce; but this is not necessary to a re-union, if she have been separated by only one or two divorces.

Of a death-bed divorce.

26. If a husband divorce his wife on his death-bed, she is nevertheless entitled to inherit, if he died before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage.

What amounts to a divorce.

27. A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.*

Of divorce purchased.

28. A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

Another mode of divorce.

29. Another mode of separation is by the husband's making oath, accompanied by an imprecation, as to his wife's infidelity, and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardised.

Of impotency.

30. Established impotency is also a ground for admitting a claim to separation on the part of the wife.

* There is recognised a species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting This divorce is technically termed *Zihar.*—*Hidaya*, book IV chap. IX.

Rules relative to parentage.

31. A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce.

Relative to the children of a female slave.

32. The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if, after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.

Of acknowledgment of parentage.

33. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.

CHAPTER VIII.

Of Guardians and Minority.

Term of minority

1. All persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.

Subdivision of.

2. There is a subdivision of the state of minority, though not so minute as in the Civil Law, the term minor being used indiscriminately to signify all persons under the age of puberty; but the term *Subee* is applied to persons in a state of infancy, and the term *Moorahiq* to those who have nearly attained puberty.*

* "The great distinction therefore was into majors and minors; but minors were again subdidived into *Puberes* and *Impuberes*; and *Impuberes* again underwent a subdivision into *Infantes* and *Impuberes*."—Summary of Taylor's Roman Law, page 124. In the Moohummudan Law a person after attaining majority is termed *Shab* till the age of thirty-four years; he is termed *Kohul* until the age of fifty-one, and *Sheikh* for the remainder of his life.

3. Minors have not different privileges at different stages of their minority, as in the English law.* Of their privileges.

4. Guardians are either natural or testamentary. Of guardians.

5. They are also near and remote. Of the former description are fathers and paternal grandfathers and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred; and their guardianship extends only to matters connected with the education and marriage of their wards. Of the same.

6. The former description of guardians answers to the term of curator in the Civil Law, and of manager in the Bengal Code of Regulations; having power over the property of the minor for purposes beneficial to him, and in their default this power does not vest in the remote guardians, but devolves on the ruling authority. Powers of near guardians.

7. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect, only where there may be no paternal kindred nor mother. Guardianship of maternal relations.

* The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor, and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands.—See Blackstone's Commentaries, vol. I: page 463.

Duration of mother's control.

8. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty.

Special rules.

9. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow.

Right of the paternal relations.

10. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor.

Of necessary debts.

11. Necessary debts contracted by any guardian for the support or education of his ward, must be discharged by him on his coming of age.

Disqualifications of a minor.

12. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make a loan, or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.

Competency of.

13. But he may receive a gift, or do any other act which is manifestly for his benefit.

Of his immovable property.

14. A guardian is not at liberty to sell the immovable property of his ward, except under seven circumstances, viz. 1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will which cannot be carried into effect without such sale; 5thly, where the produce of the property is not sufficient to defray the expense of keeping it; 6thly, where the property may be in danger of being destroyed; 7thly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Exceptions.

Of his personal property.

15. Every contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his personal property, is valid and binding upon him; provided there be no circumvention or fraud on the face of it.

Exception.

Responsibility of.

16. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others; though they are not liable in criminal matters to retaliation or to the *ultimum supplicium*, but they are liable to discretionary chastisement and correction.

CHAPTER IX.

Of Slavery.

Of legal slavery.

1. There are only two descriptions of persons recognised as slaves under the Moohummudan Law. First, infidels made captive during war; and, secondly, their descendants. These persons are subjects of inheritance, and of all kinds of contracts, in the same manner as other property.

Slavery entire or qualified.

2. The general state of bondage is subdivided into two classes, and slavery may be either entire or qualified, according to circumstances.

Of qualified slaves.

3. Qualified slaves are of three descriptions: the *Mookatib*; the *Moodubbir*, and the *Oom-i-wulud*.

Of a *Mookatib* slave.

4. A *Mookatib* slave is he between whom and his master there may have been an agreement for his ransom, on the condition of his paying a certain sum of money, either immediately, or at some future period, or by instalments.

Rules relative to.

5. If he fulfil the condition he will become free; otherwise he will revert to his former unqualified state

of bondage. In the mean time his master parts with the possession of, but not with the property in him. He is not however in the interval a fit subject of sale, gift, pledge, or hire.

Of a *Moodubbir* slave.

6. A *Moodubbir* slave is he to whom his master has promised *post-obit* emancipation—such promise however may be made absolutely, or with limitation; in other words, the freedom of the slave may be made to depend generally on the death of his master, whenever that event may happen; or it may be made conditionally, to depend on the occurrence of the event within a specified period.

Rules relative to.

7. This description of slave is not a fit subject of sale or gift, but labour may be exacted from him, and he may be let out to hire, and in the case of a female she may be given in marriage. Where the promise was made absolutely, the slave becomes free on the death of the master, whenever that event may happen; and, where made conditionally, if his death occurred within the period specified.

Exceptions to the above general rules.

8. The general law of legacies and debts is applicable to this description of slaves, they being considered as much the right of the heirs as any other description of property: consequently they can only be emancipated to the extent of one-third of the value of their persons, where the master leaves no other property; and they must perform emancipatory labour for the benefit of the heirs to the extent of the other two-thirds; and where the master dies insolvent, they do not become free until, for the benefit of the deceased's creditors, they have earned, by their labour, property to the full amount of their value.

Of an *Oom-i-wulud.*

9. An *Oom-i-wulud* is a female slave who has borne a child or children to her master.

Rules relative to.

10. The law is the same regarding this description of slave as regarding the *Moodubbir*, with this difference in her favor, that she is emancipated unconditionally on the death of her master; whether he may or may not have left other assets, or whether he may have died in a state of insolvency or otherwise. But it should be observed that the parentage of the children of such slave is not established in her master unless he acknowledge the first born.

Disqualifications of slaves.

11. Slaves labour under almost every species of legal incapacity. They cannot marry without the consent of their masters. Their evidence is not admissible nor their acknowledgments (unless they are licensed) in matters relating to property. They are not generally eligible to fill any civil office in the state, nor can they be executors, sureties, or guardians (unless to the minor children of their master by special appointment,) nor are they competent to make a gift or sale, nor to inherit or bequeath property.

Indulgences granted.

12. But, as some counterpoise to these disqualifications, they are exempted from many of the obligations of freedom. They are not liable to be sued except in the presence of their masters; they are not subject to the payment of taxes, and they cannot be imprisoned for debt. In criminal matters the indulgences extended to them are more numerous.

Of licensed slaves.

13. Any description of slave however may be licensed, either for a particular purpose or generally for commercial transactions; in which case they are allowed to act to the extent of their license.

Rules relative to the marriage of.

14. Masters may compel their slaves to marry. Unqualified slaves may be sold to make good their wives' dower and maintenance, and qualified slaves may be compelled to labour for the same purposes. A man can-

not marry a female slave, so long as he has a free wife; nor can he under any circumstances marry his own slave girl, nor can a slave marry his mistress.

Slavery of relations prohibited.

15. Persons who stand reciprocally related within the prohibited degrees cannot be the slaves of each other.

Of the issue of slaves.

16. Where issue has been begotten between the male slave of one person and the female slave of another, the maxim of *partus sequitur ventrem* applies, and the former has no legal title to the children so begotten.

Question as to a person's selling himself into slavery.

17. It is a question how far the sale of a man's own person is lawful when reduced to extreme necessity. It is declared justifiable in the *Mooheet-oo-surukhsee*, a work of unexceptionable authority. But while deference is paid to that authority, by admitting the validity of the sale, it is nevertheless universally contended that the contract should be cancelled on the application of the slave, and that he should be compelled by his labour to refund the value of what he had received from his purchaser.

Of servitude.

18. It is admitted however by all authorities that a person may hire himself for any time, even though it amount to servitude for life; but minors so hired may annul the contract on attaining majority.

CHAPTER. X.

Of Endowments.

Definition of an endowment.

1. An endowment signifies the appropriation of property to the service of God; when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind.

Rules relative to.

2. An endowment is not a fit subject of sale, gift, or inheritance; and if the appropriation be made *in extremis*, it takes effect only to the extent of a third of the

property of the appropriator. Undefined property is a fit subject of endowment.

Sale of—when allowable.

3. Endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices or other indispensable purpose, and where the object cannot be attained by farming or other temporary expedient.

Grant of—to a person not in existence.

4. In case of the grant of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant will nevertheless be valid, and the profits of the endowment will be distributed among the poor.

Superintendent of—not removable *quamdiu se bene gesserit.*

5. The ruling power cannot remove the superintendent of an endowment appointed by the appropriator, unless on proof of misconduct; nor can the appropriator himself remove such person, unless the liberty of doing so may have been specially reversed to him at the time of his making the appropriation.

Of the succession to.

6. Where the appropriator of an endowment may not have made any express provision as to who shall succeed to the office of superintendent on the death of the person nominated by himself, and he may not have left an executor, such superintendent may, on his death-bed, appoint his own successor, subject to the confirmation of the ruling power.

Rules relative to the management of.

7. The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be derivable from the exchange; nor should

endowed lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.

Cases in which the will of the founder may be contravened.

8. The injunctions of the appropriator should be observed except in the following cases: If he stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removable by them on proof of misconduct. If he stipulate that the appropriated lands shall not be let out to farm for a longer period than one year, and it be difficult to obtain a tenant for so short a period, or, by making a longer lease, it be better calculated to promote the interests of the establishment, the ruling authorities are at liberty to act without the consent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the mosque, it may nevertheless be distributed in other places and among the necessitous, though not beggars. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear deserving of it, and the endowed property may be exchanged, when it may seem advantageous, by order of such authorities; even though the appropriator may have expressly stipulated against an exchange.

Case of two superintendents.

9. Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent.

10. Where an appropriation has been made by the ruling power, from the funds of the public treasury, for public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private appropriations, with the exceptions above mentioned, the injunctions of the founder should be fulfilled. General rule for public and private endowments.

CHAPTER XI.

Of Debts and Securities.

1. Heirs are answerable for the debts of their ancestors, as far as there are assets. Responsibility of heirs.

2. The payment of debts acknowledged on a death-bed must be postponed until after the liquidation of those contracted in health, unless it be notorious that the former were *bonâ fide* contracted; and a death-bed acknowledgment of a debt in favor of an heir is entirely null and void, unless the other heirs admit that it is due. Of debts acknowledged on a death-bed.

3. If two persons jointly contract a debt and one of them die, the survivor will be held responsible for a moiety only of the debt; unless there was an express stipulation that each should be liable for the whole amount: for the law presumes that both were equal participators in the profits of the loan, and that one should not be responsible for the share of advantage acquired by the other. Case of two persons jointly contracting a debt.

4. So also where two persons are joint sureties for the payment of a debt, if one of them die, the survivor will not be considered as surety for the whole debt; unless there was an express stipulation that each should be surety for the whole, and that the one should be surety of the other. And being joint sureties.

5. It is different where two partners are engaged in traffic, contributing the same amount in capital, and In certain cases partners

are jointly and severally responsible.

being equal in all respects, in which case the one partner is responsible for all acts done and for all debts contracted by the other. But this is not the case with regard to other partnerships, in which cases a creditor of the concern cannot claim the whole debt from any one of the partners severally, but must either come upon the whole collectively, or if he prefer his claim against any one individual partner, it must be only to the extent of his share.

Of necessary debts contracted by guardians.

6. Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age.

Inhibition of debtors.

7. A general inhibition cannot be laid on a debtor to exclude him entirely from the management of his own affairs; but he may be restrained from entering into such contracts as are manifestly injurious to his creditor.

Proof of debt by confession and by evidence.

8. If a debtor, on being sued, acknowledge the debt, he must not be immediately imprisoned; but if he deny and it be established by evidence, he should be committed forthwith to jail.

Case of procrastinating debtors.

9. If, after judgment, there should be any procrastination on the part of a debtor who has been suffered to go at large, and he may have received a valuable consideration for the debt, or if it be a debt on beneficial contract, he should be committed to jail notwithstanding he plead poverty.

Special rule in certain cases.

10. But if the debt had been contracted gratuitously and without any valuable consideration having been received (as in the case of a debt contracted by a surety on account of his principal), the debtor should not be imprisoned unless the creditor can establish his solvency.

Imprisonment how determinable.

11. It is left discretionary with the judicial authorities to determine the period of imprisonment in cases of apparent insolvency.

Liberation no bar to subsequent arrest.

12. But the liberation of a debtor does not exempt him from all future pursuit by his creditors. They may cause his arrest at a subsequent period, on proof of his ability to discharge the debt.

Of attachment and sale.

13. In the attachment and sale of property belonging to a debtor, great caution is prescribed. In the first instance, his money should be applied to the liquidation of his debt; next, his personal effects; and last of all, his houses and lands.

Of mortgages and pledges.

14. There is no distinction between mortgages of lands and pledges of goods.

Of hypothecation.

15. Hypothecation is unknown to the Moohummudan Law, and seisin is a requisite condition of mortgage.

Of mortgages.

16. The creditor is not at liberty to alienate and sell the mortgage or pledge at any time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited.

Obligations of mortgagor and mortgagee.

17. It is a general rule that the pawnee is chargeable with the expence of providing for the custody, and the pawner with the expence of providing for the support, of the thing pledged; for instance, in the case of a pledge of a horse, it is necessary that the pawner should provide his food, and the pawnee his stable.

Mortgagee cannot use the pledge.

18. Where property may have been pawned or mortgaged in satisfaction of a debt, it is not lawful for the pawnee or mortgagee to use it without the consent of the pawner or mortgagor, and if he do so, he is responsible for the whole value.

Mortgage destroyed in the mortgagee's hands.

19. Where such property, being equivalent to the debt may have been destroyed, otherwise than by the act of the pawnee or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee or mortgagee is

not responsible for the excess, but where it falls short of the debt, the deficiency must be made up by the pawner or mortgagor; but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt.

Privilege of a mortgagee.

20. If a person die, leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all the other creditors.

CHAPTER XII.

OF CLAIMS AND JUDICIAL MATTERS.

No limitation.

1. There is no rule of limitation to bar a claim of right according to the Moohummudan Law.*

Parole and writing equally valid.

2. A claim founded on a verbal engagement is of equal weight with a claim founded on a written engagement.

Of informal deeds.

3. Informality in a deed does not vitiate a contract founded thereon, provided the intention of the contracting parties can otherwise be clearly ascertained.

Of priority.

4. The general rule with respect to all claims is that priority in point of time confers superiority of right.

Conflicting claims of purchase and gift.

5. Where the priority of either cannot be ascertained, a claim founded on purchase is entitled to the preference over a claim founded on gift.

Contracts generally devolve.

6. Contracts are not dissolved generally by the death of one of the contracting parties, but they devolve on the representatives as far as there may be assets; unless the subject of the contract be of a personal nature, such for instance as in the case of a lease, if either the landlord or farmer die, the contract ceases on the occurrence of that event.

Exceptions.

Additional exception.

7. So also in the case of partnership and joint concerns of any description, where the surviving partners are not bound to continue in business with

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* In the *Buhroorrayiq* an opinion is cited from the *Mubsoot*, to the effect that if a person causelessly neglect to advance his claim for a period of thirty three years, it shall not be cognizable in a court of justice; but this opinion is adverse to the received legal doctrine.

the heirs of the deceased partner, and *vice versâ*; and the obligation is extinguished, as well by civil as by natural death.

Of witnesses.

8. Oaths are not administered to witnesses.

Their number.

9. In civil claims the evidence of two men or one man and two women is generally requisite.

Incompetent witnesses.

10. Slaves, minors, and persons convicted of slander are not competent witnesses.

Inadmissible evidence.

11. The evidence of a father or grandfather, in favor of his son and his grandson, and *vice versâ*, of a husband in favor of his wife, and *vice versâ*, and of a servant in favor of his master, and *vice versâ*, is not admissible.

Of the same.

12. Nor is the evidence of a partner admissible in matters affecting the joint concern.

Female evidence, where admissible.

13. In matters which fall peculiarly within the province of women, female evidence is admissible, uncorroborated by male testimony.

And hearsay evidence.

14. Hearsay evidence is admissible to establish birth, death, marriage, cohabitation, and the appointment of a *Kazee;* as the eye witnesses to such transactions are frequently not forthcoming.

Superfluous evidence.

15. No respect is paid to any superiority in the number of witnesses above the prescribed number adduced in support of a claim.

Of evidence exceeding the claim.

16. The evidence of witnesses which tends to establish the plaintiff's claim to any thing not contained in his own statement, must be rejected; for

instance, if any of his witnesses depose to a larger sum being due to him than that claimed by himself.

And differing as to the ground of action.

17. The evidence of witnesses which tends to establish the plaintiff's claim on a ground different from that alleged by himself, must be rejected; for instance, if the plaintiff were to claim by purchase and his witnesses were to depose to his claim being founded on gift.

Where it differs as to the amount due.

18 Where a debt is claimed, and some of the witnesses depose to the debt of the whole sum claimed and others to a part of it only, the plaintiff is entitled to such part only of the sum claimed.

Of the general issue.

19. Where a defendant pleads the general issue, the *onus probandi* rests on the plaintiff.

Of special plea containing defensive matter.

20. Where a plea contains defensive matter, such as payment or satisfaction, the *onus probandi* rests on the defendant; the rule being the same as in the Civil Law, that in every issue the affirmative is to be proved.

Of the junction of a special plea and the general issue.

21. A defendant may in some cases plead both the general issue and a special plea, where they are not inconsistent; and the *onus probandi* in such case rests on the plaintiff, where the special plea is not necessary to the defence. For instance, a man sues another for half an estate, alleging that he was born in wedlock of the same father and mother as the defendant. Here the defendant may deny the allegation generally, and at the same time plead that the plaintiff was born of a different family.

A claim at variance with a former one inadmissible.

22. A claim is not admissible which may be repugnant to a former claim, both of which cannot stand; for instance, a person, in a former suit having

denied that a certain individual was his brother, cannot subsequently claim the inheritance of that person on the plea of such relation.

Unless they can both consistently stand.

23. But if the claim be at variance with a former one, and they can both consistently stand, it is admissible. For instance, a claim having been advanced to property in virtue of purchase, the same property may be claimed by the same person in virtue of inheritance; but if the claim of inheritance had been prior, a subsequent claim of purchase is not admissible, as it is manifest that they cannot both consistently stand.*

Rule where the plaintiff has no evidence.

24. If a man adduce a claim and have no evidence to support it, the general rule is that the defendant must be put to his oath, and, if he decline swearing, judgment should be given for the plaintiff; but if he deny on oath, he is absolved from the claim.

And where both parties have evidence.

25. Where both parties have evidence, that of the plaintiff is generally entitled to preference. Thus for instance, where the creditor and debtor are at issue as to the amount of a debt, and both parties have evidence, that of the former is entitled to preference, but where neither party has evidence, the assertion on oath of the latter is to be credited.

Examples.

Additional rule where both parties have evidence.

26. It is also a general principle that, where there is evidence adduced on both sides, *cæteris paribus*, the preference should be given to the witnesses of the party whose claim is greater, or who has the greater

* At first sight there might appear to be a distinction without a difference in this case; but the reason of the rule is that an heir might consistently make a purchase of property which had not devolved, but of which he was in expectancy. But it is contrary to all probability that he should have purchased, after the demise of the ancestor, property to which he had represented himself actually entitled in virtue of inheritance.

interest in the subject matter. Thus, for instance, in an action arising out of a contract of sale, where there is a disagreement about the price between the seller and purchaser, both parties having evidence, the witnesses who depose to the larger sum being due, that is of the plaintiff, are entitled to preference.

Example.

27. And where there is a disagreement, both as to the price and goods, both parties having witnesses, the evidence adduced by the seller is entitled to preference, as far as it affects the amount of the price, and that of the purchaser as far as it affects the quality and quantity of the goods.

Case of sale, the parties being at issue both as to the price and the goods, and each having evidence.

28. If neither party have evidence, they should both be put to their oaths, and, if both consent to swear, the contract must be dissolved ; but if one decline and the other swear, the decree should be passed in favour of the swearer.

And where neither has evidence.

29. But if the disagreement exist with respect to the conditions only of a sale, such as the period of payment, &c., and both parties consent to swear, the assertion on oath of the party against whom the claim is made is entitled to preference.

And where they are at issue as to the condition of a sale.

30. Where a husband and wife dispute as to the amount of dower, both parties having evidence, that of the wife must be credited, as it proves most ;* so also in a dispute between a lessor and lessee, the evidence of each party is entitled to preference as far as their individual interests are at stake ; the evidence

Suit between husband and wife, or between lessor and lessee.

* But there is an exception to this general rule. If the proper dower of the wife, that is to say the average rate of dower paid to her paternal female relations, exceed the amount claimed by her, the evidence adduced by the husband is entitled to preference, because that goes to prove some remission on her part. See *Hidaya*, vol. I. page 154.

of the lessor being received as to the amount of rent, and that of the lessee as to the duration of the term.

Claim of property in deposit or in pledge.

31. Where property is claimed, and the person, in whose possession it is, states that he is merely a depositary or pawnee of an absent proprietor, and adduces evidence in support of his assertion, the claim must be dismissed; but the claim should be rejected *in limine* where the claimant admits his title to have been derived from such absentee proprietor.

Of *exparte* judgment.

32. Judgment cannot be passed *exparte*, the reason given being, that decisions must be founded either on the defendant's confession, or (notwithstanding his denial) on proof by witnesses; and where he is absent, it cannot be said whether he would have denied or admitted the claim.

Of arbitration.

33. When cases are referred to arbitration, it is requisite that the decision of the arbitrators should be unanimous.

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THE

MOHAMMEDAN LAW

OF

INHERITANCE, GIFT, WILL, SALE, AND MORTGAGE,

AS CONTAINED IN THE TREATISE

BY

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Remarks by the Editor.

All those portions of Elberling's Treatise, which treat on the Mahomedan Law as well regarding inheritance as on other titles, have been carefully inserted in the following pages. Each Section of this Edition is invariably marked at the end with the very figure which stands at the beginning of the same Section in the original, so that, if necessary, any part may be traced therein. The reason of my collecting together all those passages which treat of the Mahomedan Law, is to save the reader the trouble of hunting over this and that part of the work for principles of the Mahomedan Law, which are scattered over the whole book. Those principles thus collected together, with a good Index, such as is given in this Edition, will, it is hoped, be of great convenience to students as well as to the profession.

Shamachurn Sircar.

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PRELIMINARY REMARKS.

ON THE RIGHT OF INHERITANCE IN GENERAL.

The right of inheritance depends upon positive laws.

THE right of inheritance is not a natural right but a right established by positive laws. A son has no greater right to take the property which belonged to his deceased father than every other individual, and much less has the eldest son any right to take the property in preference to his other brothers, or the sons in general in preference to their sisters or their mother. Every nation has therefore its own law of inheritance. Generally, the right of inheritance depends upon the nature of kindred and on wedlock; but the laws differ by admitting different individuals, or admitting them in a different order, or dividing the inheritance in different shares. A daughter, for instance, takes under the Mahomedan law a half share of a son when the deceased has left sons and daughters; but under the Hindoo law she takes only in default of sons, grandsons, and widows; and under the English law she takes an equal share with her brother of *personal* property. Again, when a person leaves sons and sons of a deceased son, the latter take, under the Hindoo law and English law, with the sons, by what is called "the right of representation;" that is to say, the grandsons stand in the place of their father, and take the share which he would have taken, if he had survived the deceased; but under the Mahomedan law the grandsons obtain in that case no share at all, being excluded by the sons as nearer of kin. (Sect. 80.)

What law of inheritance applicable.

The rules of inheritance are, for Mahomedans, the Mahomedan law of inheritance, Reg. 4, 1793, Sec. 15; for Hindoos, the Hindoo law of inheritance, Reg. 4, 1793, Sec. 15; for British subjects and for Indo-Britons, the English law of inheritance, S. D. A. Rep. vol. ii. p. 229, vol. iv. p. 243; for native Portuguese, of the Catholic faith, the Portuguese law of inheritance, S. D. A. Rep. vol. ii. p. 227; for foreigners, their respective laws of inheritance, S. D. A. Rep. vol. v. p. 176. For native Christians, it must be the law of their ancestors, either the Mahomedan or the Hindoo, as they or their ancestors had belonged to the one faith or the other. (Sect. 81.)

Necessary requisites to inherit, 1. That the inheritee is dead, 2. That the heir is alive.

To inherit, it is necessary, 1st, that the person whose property is to be acquired by inheritance is dead,[1] 2ndly, that the person who is to acquire the property—the heir—is alive. If any of these two facts is disputed, it must be proved.[2]

Missing person.

The fact that a person has been missing for a considerable period of time without any knowledge of his existence is generally considered as a proof of his decease, and as establishing a legal title to succession on the part of the heirs.[3] —See section 136. (Sect. 82.)

If the inheritee and the heir dic at the same time.

Should the inheritee and the heir have died by the same accident (for instance, in a shipwreck,

1 Retirement from the world and degradation operate as natural death according to Hindu law. *Dáyabhága*, vol. i. p. 3, Dig. book, v. sec. 6. Princ. Hindu law, vol. ii, p. 2, 130. After the death of the father and the mother, sons may divide his estate. *Manu*, ix. s. 104. *Dáyabhága*, ch. i. s. 14. Dig. book, v. s. 5.

2 *Hedaya*, vol. iv. p. 6.

3 Twelve years' absence is required by Hindu law, *Mussumat Ayabutee* versus *Raikissen Shaw*, S. D. A. Rep. vol. iii. p. 28. Princ. Hindu Law, vol. ii. p. 9, 26, and "that the missing person would have been ninety years of age at that time if alive" by Mahomedan law. *Serajiyah*, S. D. A. Rep, vol. v. p. 103. Baillie, 166.

by a fire, &c.) and it cannot be proved who died first, it must be presumed that the death was simultaneous, and the one cannot inherit from the other, but the estate of each will go to his respective surviving heirs, as if the intermediate heir, who died at the same time, had never existed.[1] (Sect. 83.)

Posthumous children inherit.

It is not necessary that the heir should be actually born, it is sufficient that he was begotten and afterwards born with vitality. When born with vitality it is of no moment how soon after the child may expire; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child.[2] (Sect. 84.)

That the person claiming the inheritance is the true heir.

A third requisite is that the heir is really connected with the deceased in the manner stated by him and required by law; that is to say, if the heir claims as son, that he is the progeny of the deceased, and not of another person; if he claims as legitimate son, that his father and mother were legally married; or if he claims as brother, that he is the son of the same parents as the deceased, or of his father, or of his mother. Whenever it is disputed whether a person is the heir or not, it must be proved in the regular way, but as the inheritance is the sole right of the heirs, their testimony or acknowledgment must be credited in every matter which affects it.[3] (Sect. 85.)

1 *Serajiyah.* Princ. Mahomedan Law, 30. Baillie, 172. See also 2 Blackstone's Com. 516, Note.

2 *Hedaya,* vol. ii. p. 670. Digest, book v. s. 117. Princ. Hindu Law, vol. ii. p. 176.—10 and 11. Will. 3, Sect. 16. 2 Blackstone's Com. 169. Toller, 374.

3 *Hedaya,* vol. i. p. 381. If a man acknowledge a boy to be his son, and afterwards die, and the mother then declare herself the wife of the deceased, she is to be believed and inherits if she is a freewoman. *Hedaya,* vol. i. p. 384, Princ Mahomedan law. 132.

ON SUCCESSION TO PROPERTY IN GENERAL.

Duties of the ruling power with respect to property of deceased persons according to Mahomedan law.

It is distinctly laid down in the Mahomedan law, that it is the duty of the civil judge (the *kazee*) to watch the interests of those who, either on account of their age, natural infirmities, or absence are unable to manage their own affairs.[1] The judge is therefore bound to see the property of a deceased person applied according to the will of the deceased and the rules of inheritance; and to exert a general superintendence over all such property until it be taken possession of by the persons entitled thereto, or applied according to law.[2] (Sect. 45.)

ON THE MAHOMEDAN LAW.[3]

Foundation of the Mahomedan law.

1 The *Koran.*

The basis of the Mahomedan law, religious, civil, and criminal, is the *Koran,* believed to be of divine origin and to have been revealed by an angel to *Mahomed,* collected by *Aboo Beker,* and promulgated in the 30th year of the *Hejirah*—year of Christ 622.[4] (Sect. 13.)

2 The *Soonnut.*

As the ordinances of the *Koran* in civil matters are few and imperfect, the rules of conduct (*Ahadees, Soonnut,* or *Revayat*) deduced from the oral precepts, actions, and decisions of the prophet, form the second authority, conclusive in all cases not expressly determined by the words of the *Koran.* They were collected after his death by tradition from his companions, contemporaries, and successors. (Sect. 14.)

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1. *Sirajiyah. Hedaya,* B. iv. p. 550; see also Menu, Dig. vol. v. p. 449, "the king should guard the property of an infant."

2. Baillie, 112.

3. See Harington, i. 223, Hamilton, Pref. to *Hedayah.*

4. Sale's Prel. Disc. to the *Koran* Sec. 3.

The schism, which took place after *Mahomed's* death among his followers, divided the *Mussulmans* into two sects, the *Soonnees* and *Shias*, who have their own collections of *Ahadees*, which they respectively consider genuine and authoritative. The *Soonnees* allow traditionary credit to the companions of the prophet, his four immediate followers, and some of his contemporaries; but the *Shias* give credit only to *Alee* and his partisans, and to those sayings and actions which they believe to have been verified by any of the twelve *Imams*. (Sect. 15.)

Differently interpreted by the *Soonnees* and the *Shias*.

If no rule of decision be found either in the *Koran* or *Soonnut*, the *Soonnees* admit as a third source of legal authority the concurrence of the companions of *Mahomed*; and if this also fail, they allow the validity of reason, restricted by analogy, in applying by inference the general principles of law and justice to the various transactions and circumstances of the changeful scene of human life, which, as they could not all be foreseen, it was impossible they could all be provided for.

Further legal authorities received by the *Soonnees*.

Though all the *Soonnees* agree in matters of faith, they disagree in points of practical jurisprudence; some following one, some another of the four different great authorities. *Imam Daood* of *Ispahan* entirely rejected the exercise of reason, whilst *Aboo Hunneefah* (died 772,) was so much inclined to it, that he frequently preferred it to traditions of a single authority; and *Malik*, (died 801,) *Shafijee*, (died 826,) and *Ibn-i-Hunbul*, (died 863,) seldom had recourse to analogical argument, when they could apply either a positive rule or a tradition. (Sect. 16.)

Who in civil matters follow different authorities.

The authority of *Aboo Hunneefah* and his two disciples *Aboo Yoosuf* (died 804,) and *Imam Mahomed* (died 901 or 911,) is paramount in Bengal and Hindoostan. The opinions of the disciples are so much

Who is to be followed when the authorities differ.

respected that, when they both dissent from their master, the judge is at liberty to adopt either of the two opinions. If there be a difference between the two disciples, whichever agrees with *Aboo Hunnefah* must be preferred; and in all judicial matters the single opinion of *Aboo Yoosuf* is preferred to that of *Imam Mahomed.* (Sect. 17.)

Works extant.

Aboo Hunneefah has not left any work on jurisprudence, but his doctrines are recorded and illustrated by his disciples, particularly *Imam Mahomed* in the *Zahir-oo-ruwayat,* and commented on by different persons. However, neither the text nor the comments are known to be in existence, except an imperfect copy of one commentary. The oldest work on jurisprudence in existence is the *Mokhtusur-ool-Kuduree,* written in the 11th century of the Christian era.

The other books in actual use for expounding the Mahomedan law are of two descriptions. 1. The first consists of texts and comments,which in a scientific method state the elements and principles of the law, establish them by proofs and reasoning, and illustrate the application of them by select cases, real or supposed, such as the *Hedayah; Kunz-oo-dukayik; Vikayah ; Nikayah ;* and *Ashbat-o-Nuzavir,* with their respective commentaries. 2. The second description is commonly, but not always,distinguished by the title of *Futawa,*and is for the most part a collection of law cases arranged under proper heads, with a short recital of facts and circumstances without arguments and with authorities only for the cases as quoted. The *Futawa-i-Kazee-Khan* written at the end of the 12th century, and the *Futawa* of *Alumgeer,* compiled in 1689, by order of *Aurungzeb* (also called *Alumgeer,*) are the most esteemed ; the last is universally received as an authority in this country. (Sect. 18.)

The *Hedayah* or "the Guide" is the most celebrated of the law books. It is a commentary upon the *Bidayut-ool-Moobtudee* (an introduction to the study of law) by *Shaikh Boorhun-oo-deen Alee*, who died in the year 1213. It contains a selection of law cases illustrated by the proofs and arguments by which they have been determined. Many commentaries have been written upon the *Hedayah*, but only four are extant in Bengal. For the instruction of the Courts, the *Hedayah* has been translated under the auspices of Government, into Persian and English.[1] (Sect. 19.) The *Hedayah*.

The *Futawa-i-Alumgeeree* is four times the size of the *Hedayah*, and contains little more than a recital of law cases under 61 different heads without arguments and proofs, as they are stated in the *Hedayah*. It is most useful for elementary instruction, as the other is for practical use. It is valuable also as the latest and most comprehensive compilation, but it was compiled by several persons of different judgment and unequal ability. The one is a most useful addition to the other. (Sect. 20.) *Futawa Alumgeeree*.

The law of inheritance is not contained in the *Hedayah*, but in a separate work, "the *Furajid-oo-Sujawundee*," composed by *Imam Sirajoodeen Mahmood ben-i-Abdoo Rusheed* of *Sujawund*, and commonly called the *Furaez-i-Sirajiyah*.[2] Forty commentaries have been written upon this treatise, the best of which is the *Shureefeea* by *Shureef Alee Ben-i-Mohummud* (year 1426,) which is of the first authority and universally received.[3] (Sect. 21.) The *Sirajiyah* and *Shureefeeah*.

1. The *Hedayah* by C. Hamilton, 4 vols. 4to. London, 1791.

2. The *Sirajyah* was translated into English by Sir W. Jones, 1792, in his works. Vol. 3, 505.

3. See N. Baillie's Mahomedan Law of Inheritance, Calcutta, 1832, which contains many extracts from the *Shureefeeah*.

ON THE ORDER OF SUCCESSION ACCORDING TO MAHOMEDAN LAW.

The order of succession different according to the doctrines of the *Soonnees* and the *Shias*.

The order of succession is different according to the doctrines of the *Soonnees* and the *Shias*, though both have the same basis, viz. the following passage in the *Koran*. "God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if there be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part, and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Morover you may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this

number, they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs."

"They will consult thee for thy decision in certain cases: say unto them, 'God giveth you these determinations concerning the more remote degrees of kindred.' If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have, between them, two-third parts of what he shall leave; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."[1] (Sec. 86.)

Interest of heirs protected.

By the above rules the rights of all parties are fairly secured. After the payment of funeral charges, debts, and legacies as far as one-third of the residue, the remainder will go to the heirs; and not only the children, but the father, the mother, husband or wife, are all simultaneously entitled to a portion thereof, and their interest is so carefully protected that even gifts on a death-bed are considered as bequests, and are reckoned in the one-third of which the proprietor is allowed to dispose by legacies, and acknowledgments of debt made on a death-bed in favor of an heir, are utterly void, unless afterwards assented to by the other heirs.[2] (Sec. 87.)

Heirs cannot be disinherited.

Neither a child nor any other heir can be disinherted, nor can one heir be favoured to the prejudice of the other; but as a man is at liberty to dispose of his property as he pleases, *during his life time*, he can, under the common rules of gift, make such disposals,

---

1 *Koran*, chapter 4. *Al Sirajiyah* (W. Jones's Works, vol. iii. p. 505, 4to. Edition.) Princ. Mahomedan Law, p. 1 to 41; p. 83 to 165. Baillie: Mahomedan Law of Inheritance, Calcutta, 1832.

2 *Hedaya*, vol. iv. p. 490; vol. iii. p. 164. Baillie, p. 4.

as will virtually amount to a disinheritance, or a disposal in favour of one of his heirs.[1] (Sec. 88.)

Peculiarities of Mahomedan Law.

No distinction between ancestral and acquired property.

No right of primogeniture.

Females inherit.

In the distribution of the estate among the heirs the Mahomedan Law has several peculiarities. There is no distinction between real and personal, or between ancestral and acquired property; primogeniture confers no superior right, but all the sons, whatever their number, inherit equally; females are not only not excluded from inheriting, but besides that some—the widow, mother, daughter and sister—are very near heirs, females always[2] get half the share of their brothers, when inheriting with them, and take with the same full proprietary right as males; so that the property devolves after their death on *their* heirs. The same is the case with widows, who take their share without any restriction in the disposal of it, and after their death, the property inherited from the husband, goes to their heirs, not to the heirs of their husband.[3] A

No right of representation

right of representation (Sec. 80,) is unknown; the nearer of kin exclude the more remote, and illegitimate children inherit only from the mother and mother's kindred.[4] According to most rules of inheritance, the descendants exclude all other relations, but by Mahomedan Law, parents, children, and the widow or widower, are simultaneously called to inherit. (Sec. 89.)

ACCORDING TO THE DOCTRINE OF THE SOONNEES.

Order of Succession.

Order of succession.

Of the heirs, there are some for whom the law has provided certain specific shares or portions, and who are

1. Sharers.

thence denominated *sharers*. In most cases there must be

1 Princ. Mahomedan Law, p. 121.

2 Princ. Mahomedan Law, pp. 2, 84, except half brothers and sisters on the *mother's* side, who share equally. (Sec. 112.)

3 *Ibid*, p. 85. 4 *Ibid*, p. 91.

a residue after the shares have been satisfied, and this passes to another class of persons, who from that circumstance may be termed *residuaries.* The name however is not always appropriate, for it may happen that the deceased has not left any relatives of the class of sharers, and then the whole will pass to one or more individuals of the second class. When there are sharers but no residuaries, the surplus, which would have passed to the latter, reverts to the former, with two exceptions, (Sec. 128) being divisible among them according to the respective amount of their shares, and this right of reversion constitutes what is technically called the return. It can but seldom happen that the deceased should leave no individual connected with him, who would come under one or other of the classes already mentioned. But to guard against this possible contingency, the law has provided another class of persons, who, though many of them are nearly related to the deceased, have yet been denominated *distant kindred,* by reason of their remote position with respect to the inheritance.[1] (Sec. 90.)

2. Residuaries.

The return.

3. Distant kindred.

The portion of those who are legal sharers only, and not residuary heirs, can be stated determinately; but the portion receivable by those who are both sharers and residuaries, is variable, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters, who are under some circumstances legal sharers, and under others residuaries, and in the case of fathers and grandfathers, who are under some circumstances legal sharers only, and under others residuaries also, the extent of their portion

The portion of husband & wife are absolutely determinable.

The shares of other heirs vary in each case.

1 *Sirajyah* and *Shureefeea.* Baillie, p. 12.

depends entirely upon the degree of relation of the other heirs and their number. Daughters without sons are legal sharers, and so are sisters without brothers, but with them, they are residuaries. Grandfathers and fathers with sons, son's son, &c. are legal sharers, but with daughters only, they are residuaries as well as legal sharers.[1] (Sec. 91.)

4. Successor by contract.

Should there be neither sharer nor residuary, nor any of the distant kindred alive and capable of inheriting, the estate goes (unless there be a widow or widower, who is first entitled to a share) to him who may be called the successor by contract.[2] The form of this contract is as follows: a person of unknown descent says to another: "thou art my *mowla* (master,) and shalt inherit to me when I die, paying my fine when I commit an offence;" and the other answers: "I have accepted." (Sec. 92.)

5. By acknowledgment of kindred.

Next to the successor by contract is a person in whose favor the deceased has made an acknowledgment of kindred, but of such a nature as not to establish his consanguinity. To make such an acknowledgment valid, three conditions must be observed. 1. It must be in such terms as at least to imply the descent of the person acknowledged from some other person than the acknowledger himself. 2. It must be such, as not to establish the descent of the person acknowledged, for instance not an acknowledgement of one as a brother *assented to by the acknowledger's father*, which under some exceptions would establish the paternity, as this would give the party an interest in the inheritance on a ground distinct from the acknowledgment, namely, as brother to

1 Princ. Mahomedan Law, p. 3.

2 Baillie, p. 15.

the deceased. 3. The acknowledgment must never have been retracted.[1] (Sec. 93.)

6 Universal legatee.

Though the law does not allow a Mahomedan the power of disposing by will of more than a third of his property, still if he have appointed a legatee of the whole and have left no known heir, nor successor by contract, nor successor acknowledged as last mentioned, —such legatee is permitted to take the property; for the prohibition against bequeathing more than a third exists solely for the benefit of the heirs.[2] (Sec. 94.)

7 Public treasury.

Last of all, when there are none of the persons before mentioned to claim the property, it falls to the public treasury. The Governor General in Council will order how it shall be applied. See Sec. 52. (Sec. 95.)

ON SHARERS.

There are six shares and twelve sharers, four male, eight females.

The shares are: a half, a fourth, an eighth, two-thirds, one-third, and a sixth. And there are twelve classes of persons for whom they are appointed; of which four are males, namely the father, true grandfather,[3] half brother by the same mother, and husband; and the remaining eight are females, viz. the wife, the daughter, daughter of a son how low soever, that is, of any male descendant connected with the deceased entirely through males, sister of the full blood, or by the same father only, or the same mother only, the mother and true grandmother. (Sec. 96.)

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1 Baillie, p. 17. Commentary on the *Sirajyah* by Sir W. Jones: —Jones's Works, vol. iii. p. 558. 4to. Edition.

2 *Sirajiyah* and *Shureefeeah*. Baillie, p. 19. Mahomed Ameenooddeen Khan *versus* Mahomed Kobeerooddeen, S. D. A. Rep. vol. iv. p. 49. Princ. Mahomedan Law, p. 243.

3 A true grandfather is a male ancestor into whose line of relationship to the deceased a female does not enter;—a false grandfather is one into whose line a female is interposed.

Some of the sharers are liable to partial and others to total exclusion.

The persons above enumerated do not all succeed simultaneously, nor are their shares constantly the same. On the contrary, some of them are in the most ordinary cases entirely excluded, and the shares of the others, though they are always entitled to some participation in the inheritance, are liable under certain circumstances to reduction. The latter class includes the husband and wife, father, mother, and daughter; the former, the seven other persons. The exclusion of these persons is founded upon two general principles applicable alike to sharers and residuaries. 1st. That a person who is related to the deceased through another, has no interest in the succession during the life of that other, with the exception of half brothers or sisters by the mother, who are not excluded by her. 2nd. That the nearer relative to the deceased excludes the more remote. Thus a grandfather is excluded by a father upon both principles, being more remote and also connected through him with the deceased, and a grandson is excluded by a son upon both principles, when that son is his father, and upon the second principle, when that son is his paternal uncle.[1] (Sec. 97.)

Share of the husband.

The share of a husband[2] is one-half; but it is reduced to a fourth when there is a child or a child of a son how low soever, that is, any male descendant connected with the deceased entirely by males. And to one or other of these shares the husband is always entitled, being one of the persons who are never entirely excluded. See Sec. 97. (Sec. 98.)

Share of the widow.

The share of a wife is the half of a husband in similar circumstances; being an eighth when there is

1 Baillie, p. 57.

2 If he has divorced her, he takes nothing. Princ. Mahommedan Law, p. 118.

a child or child of a son, how low soever, and a fourth when there is none. If the deceased leaves several widows, they share the said one-fourth or one-eighth equally among them. (Sec. 99.)

The share of a daughter.

A daughter's share, when there is only one, and no son, is a half of the property; and the share of two or more daughters in the same predicament is two-thirds among them. When there is a son they lose their character of sharers and become residuaries with him by reason of the principle laid down in the *Koran* "that the portion of a son shall be double that of a daughter." (Sec. 100.)

The share of a son's daughter.

When the deceased has left neither son, nor daughter, nor son's son, the share of the inheritance appropriated to daughters passes to the daughters of the son, who then come into the place of daughters in every respect, namely, a half is the share of one, and two-thirds of two or more. When there happen to be in the same degree with daughters of the sons, one or more males who are residuaries, as their own brother or the son of their paternal uncle, the son's daughters become residuaries in the same manner as daughters. (Sec. 101.)

Son's daughter excluded by sons.

And as sharers by two or more daughters.

As the shares of daughters sink into the residue when there is a son, there can be nothing to pass to the series of heirs beyond them, and the son's daughters are therefore always excluded by the existence of a son. They are likewise excluded as *sharers* when the deceased has left two or more daughters, though no son, because the whole of the two-thirds appropriated to daughters is then exhausted by themselves. But where there is only one daughter and no son, the complement of two-thirds after deducting the moiety, being one-sixth of the estate, passes to the daughters of the son. (Sec. 102.)

They take sometimes as residuaries, with two or more daughters.

Though son's daughters are entirely excluded as *sharers*, when there are two or more daughters, they are nevertheless in some instances admitted to a trifling participation in the inheritance by the operation of the rule already noticed. This happens when there is a male, or males, in the same or a lower degree entitled to the residue. Suppose that the deceased has left no son, but two or more daughters and grandchildren both male and female by a son. Here two-thirds being set apart for the daughters, there is nothing to pass to the son's daughters as sharers; but if there be no other legal sharers, the remaining third is divided, as residue between the grandchildren, in the *ratio* of two parts to a male and one to a female. Strictly speaking, the operation of this rule ought to be confined to the case where the residuary is in the same degree with the daughters of the son. But it seemed hard that they should be deprived, by a more remote relative, of an advantage, which they enjoy with one who is nearer, and the rule has been extended accordingly.[1] The extension however is limited to cases where the more enlarged construction is beneficial to them; for whenever they happen to be legal sharers, it is only by a male of the same degree that they can be made residuaries.

The same principles are applicable to the daughters of a grandson and so on. (Sec. 103.)

The share of the father.

The father is a "sharer" as well as a "residuary." As sharer his portion is one-sixth. He is simply a sharer, being entitled to a sixth of the estate, when the deceased has left a son, or son's son how low soever. When there are only daughters or son's daughters, he is both a sharer and residuary; and simply a residuary

1 *Shureefeeah.* Baillie, p. 62.

where there is no child, nor child of a son how low soever. (Sec. 104.)

The true grandfather (Sec. 96) takes one-sixth as the father, but is excluded by the father, if he be living. He is also liable to be affected by the rights of the mother and grandmother. Thus a paternal grandmother, who is entirely excluded by the father, is capable of inheriting with the true grandfather; and a mother, who, when there is a father and a husband or wife, gets no more than a third of the remainder, after deducting the share of the husband and wife, is entitled to one-third of the whole, when there is a grandfather instead of a father. (Sec. 105.)

The share of the true grandfather.

The share of a mother is a sixth, when there is a child living, or the child of a son how low soever, or two or more brothers and sisters whether of the whole or half blood. And in all other cases, with only two exceptions, her share is a third.

The share of the mother.

The exceptions are: 1st, when the deceased has left a husband and both parents; or, 2nd, a wife and both parents. If, in the first case, the mother should take one-third, the husband's share being one-half, the father would only get one-sixth; and, in the second case, if she took one-third, the wife's share being one-fourth, the father would only get five-twelfths, both of which would disagree with the general rule that the share of a male shall be double that of a female, when they succeed together. To avoid this inconsistency, the share of the mother is reduced to *one-third of the remainder*, after deducting the portion of the husband or wife, by which means the proper *ratio* is preserved between the shares of the father and mother; for the former being in this case the residuary will take the

Share of mother with husband *or* wife and father.

remaining two-thirds, or exactly double the portion of the latter. (Sec. 106.)

The benefit of the deduction in mother's share by the existence of brothers and sisters, goes to father.

It has been observed, that the mother's share, when there are two or more brothers and sisters, is a sixth. It will be seen hereafter, that brothers and sisters are entirely excluded by the existence of the father; yet it may be asked, whether the other sixth, which they are thus the means of cutting off from the mother, belongs to themselves, or devolves on the father? This question has given occasion to much discussion, but *Aboo Huneefah* has determined in favour of the father on the strength of the following passage in the *Koran*,—"but if he have no child, and his parents be his heirs, then his mother shall have the third part; and if he have brethren, his mother shall have a sixth part." Here it is contended that, as the father is undoubtedly entitled under the first clause of the sentence to the remainder, after deducting the mother's third, so the latter part of the sentence ought to be taken as if it had stood thus: "and if he have brethren, *and his parents be his heirs*, his mother shall have a sixth part, *and his father the remainder*.[1] (Sec. 107.)

The share of the true grandmother.

The share of a true grandmother[2] is a sixth, which, if there be more than one of them in the same degree, is divided between them equally. True grandmothers are excluded by the existence of the mother; those on her own side for two reasons; first, because they are connected with the deceased through her; and secondly, because they have but one common cause of succession, namely,

1 *Shureefeeah.* Baillie, p. 64.

2 A true grandmother is any lineal female ancestor in whose line of relationship a false grandfather does not enter (Sec. 96.) The mother's mother and the father's mother are of course true grandmothers, as the father's father is a true grandfather; but the mother's father's mother is a false grandmother and the mother's

maternity. She excludes the paternal grandmothers for the latter reason only. These are also excluded by the existence of the father, or the paternal grandfather, but the maternal grandmothers are not excluded by them.

The nearer excludes the more remote.

Amongst grandmothers, the more remote is excluded by the nearer, even though she should be incapable of taking any part of the inheritance. Thus the paternal grandmother is excluded by the father, but she is nevertheless capable of excluding the mother of the mother's mother, though the latter would not, as noticed, be excluded by the father himself.

Different opinions of the share of a grandmother related on both sides.

When a grandmother is related to the deceased on both sides, she takes, according to *Mohammed*, double the share of a grandmother only related on one side from the portion (one-sixth) allotted to the grandmothers, but according to *Aboo Yoosuf*, whose opinion is the most approved, they share equally.[1]



For instance according to this table, let F be the deceased; D and E his father and mother are both the grandchildren of A; A is consequently the great grandmother of F on the father's as well as on the mother's side. (Sec. 108.)

The share of a full sister.

Sisters by the same father and mother take in default of children, or children of a son how low soever, as daughters, namely, a half is the legal share of one, and two-thirds of two or more.

If there be full brothers, the sisters become residuaries through them, by reason of their equality in the degree of relation to the deceased, but the male has the portion of two females.

1 *Shureefeeah.* Baillie, p. 67.

Excluded by son, son's son, father, and true grandfather.

In all these cases, however, the share of the sisters is liable to be intercepted by a father or true grandfather, by whom they are absolutely excluded, as well as by a son or son's son how low soever.[1] (Sec. 109.)

Become residuaries with two or more daughters.

When there are two or more daughters, or daughters of a son how low soever, but neither son nor son's son, father, or true grandfather, to exclude them, it would be hard if the remainder should go to a residuary less closely connected with the deceased than sisters. The prophet himself has anticipated and obviated this hardship, by directing that sisters, in this case, shall be residuaries with daughters or the daughters of a son; and their portion will be either one-half or a third, as there may be one or more in existence. Yet full sisters cannot supersede the husband or wife, mother, or true grandmother. These being legal sharers must be satisfied before any thing can pass to a residuary. (Sec. 110.)

Share of half sisters by the father.

Half sisters by the father come into the place of full sisters, when there are none; that is, the share of one is a half, and of two or more, two-thirds, while with daughters and son's daughters, they become residuaries. With *one* full sister, whenever she is entitled to a half, they take the complement of two-thirds, viz. one-sixth, but by two or more full sisters they are entirely excluded, unless there happens to be a half brother by the father, who makes them residuaries, when they become entitled to participate in the residue in the *ratio* of two parts to a male, and one to a female. (Sec. 111.)

Share of half brothers and sisters by the mother.

Half brothers and sisters by the same mother, are entirely excluded by the existence of a child, or the child of a son how low soever, or of a father or true grandfather; and in all other cases, the legal share of

1 *Serajiyah*, Baillie, p. 67.

one is a sixth, and of two or more, one-third. There is no distinction in this case in favor of the sex, both males and females having the same right and succeeding equally.[1] (Sec. 112.)

ON RESIDUARIES.

The surplus of the estate after the sharers have been satisfied goes to the residuaries.

In most of the cases mentioned in the last chapter, there is a residue after the portions of the legal sharers have been separated from the estate; this residue passes to a class of persons who are termed residuaries by the learned, and who originally seem to have been the sole heirs of an intestate person. (Sec. 113.)

Different kinds of residuaries.

The residuaries are either so by relation or by a special cause. Residuaries by relation are of three kinds: the residuary in his own right; the residuary in another's right, and the residuary together with another. (Sec. 114.)

Residuaries in right of another.

The two last classes have been mentioned in the former chapter; the residuaries in another's right are daughters (Sec. 100,) son's daughters (Sec. 101,) full sisters and half sisters by the father (Sec. 110, 111,) all of whom lose their character of sharers and become residuaries, when there exist one or more males in the same or a lower degree. Residuaries with another are sisters with two or more daughters, or daughters of a son how low soever. See Sec. 110. (Sec. 115.)

And with another.

Who are residuaries.

The residuary in his own right is "*every male* in whose line of relation to the deceased no female enters." They are of three classes:

1st, Descendants; 2nd, Ascendants; 3rd, Collaterals, (Sec. 116.)

1 It is said, Princ. Mahomedan Law, viii. 2,—"that the general rule of a double share to the male applies to their issue," but their issue are neither sharers nor residuaries, but belong to the distant kindred (Sec. 124,) and it is the general opinion that their succession is regulated in the same way as that of their parents, without any distinction on account of sex. Baillie, p. 69.

1 Descendants. The first class is the male offspring of the deceased; first, his sons; then, their sons and son's son, and so on in the direct male line; there is no right of representation; the sons of the deceased son are excluded by the other surviving sons. (Sec. 117.)

2 Ascendants. The second class contains "the root," or the paternal ancestors of the deceased; first, the father, then, the paternal grandfather, great grandfather, and so on. The nearer exclude the more remote. (Sec. 118.)

3 Collaterals. Of the collaterals, the offspring of the father comes first, viz. the brothers of the deceased, then, their sons how low soever; then comes the offspring of the grandfather, viz. the uncles of the deceased, then, their sons how low soever; then comes the offspring of the great grandfather and their sons how low soever, and so on.[1] The nearest in degree is preferred to the more remote, and, of those related in the same degree, those of the whole blood are preferred to those of the half. (Sec. 119.)

4 Emancipator. A residuary through a special cause is one who is the emancipator or emancipatrix of a freedman, who, and whose residuary heirs in the order before stated, inherit from a freedman who dies without residuary

1 Sir W. Jones's Works, vol. iii, p 537—and Sir W. Macnaghten. Princ. Mahomedan Law, p. 7, No. 43,—limit the collateral heirs to the two lines, viz. to the fathers and grandfathers, but this is incorrect. Every male in whose line of relation to the deceased no female enters are distinctly called residuary heirs and the word "grandfather" comprehends all paternal ancestors. The word "nearest" grandfather in the Calcutta edition of the *Sirajiyah* is an interpolation, which disagrees with the definition of "a residuary heir" and with the *Koodooree* and the *Futawa Alumgeree*, see Baillie, p. 77. By a decree in the Supreme Court, 2nd term 1831, Doe on the demise of Sheikh Mohammed Buksh *versus* Shurf-oon-Nissa Begum and Tajun Beebee, it was decided that a male descendant of the great grandfather was residuary heir.

heirs by descent. The legal sharers of the emancipator are excluded from taking any share, and females have been expressly excluded in this case by the prophet himself. (Sec. 120.)

When the freedman leaves father and son of his emancipator, *Aboo Yoosuf* considers the father entitled to a sixth, but *Hunifah* as well as *Mahomed* vests the whole right in the son.

OF DISTANT KINDRED.

When there are neither sharers nor residuaries, the inheritance goes to "the distant kindred," which comprehends "all relatives, who are neither sharers nor residuaries." Of the distant kindred there are four classes:

Who are distant kindred

1. The children of daughters and son's daughters, how low soever, and whether male or female.

They comprehend four classes.

2. The excluded or false fathers, as the maternal grandfather and his father, and the excluded or false grandmothers how high soever, as the mother of the maternal grandfather, and the mother of the maternal grandfather's mother.[1]

3. The children of sisters, whether male or female, and the daughters of brothers how low soever, and whether the sister or brother, from whom they are descended, was connected with the deceased through both parents, or only through one; also the sons of half-brothers by the mother, how low soever.

1 There are different reports of the opinion of *Aboo Huneefah* with respect to the first and second class: *Aboo Suleiman* says, that *Aboo Huneefah* declared the second class to be the nearest. Baillie, p. 127.

4. The paternal aunts, (viz. father's sisters) and paternal uncles by the mother, (viz. the half-brothers of his father by the same mother,) and the maternal uncles and aunts and their children how low soever, and of whichever sex. (Sec. 121.)

Distribution in the first class of distant kindred.

In the first class: 1. The nearest in degree is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of the son's daughter; the first being related to the deceased in the second, the other in the third degree.

1. The nearest in degree preferred to the more remote.

2. One related through an heir preferred to one not so related.

2. Of claimants in equal degree, they who are related to the deceased through an heir (a sharer)[1] have preference over those not so related. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter. Both are related to the deceased in the third degree, but a son's daughter is an heir, and a daughter's daughter is not an heir; the first therefore excludes the other.

3. Distribution regulated by the sex of the root and number of the branches.

3. If their degrees are equal, and they are on the same footing with respect to the person through whom they claim, all or none of them being the offspring of heirs, but if the sexes of the ancestors differ in any stage of ascent, the distribution will be made with reference to such difference of sex, regard being had to the stage at which the difference first appeared, so that the branches will obtain the inheritance of the root.[2] Thus the daughter of the daughter of a daughter's son, will receive twice as much as the son of the daughter of a daughter's daughter, because one of the ancestors of the former

1 By the child of an heir is meant the child of "a sharer." See *Shureefeeah*, Baillie, p. 130.

2 This is the opinion of *Mohammed*, whose opinion is preferred. *Aboo Yoosuf* considers only the sex of the heir, not the sex of the ancestor. Baillie, p. 130. Sir W. Jones's Works, vol. iii. p. 540.

was a male, whose portion is double that of a female. Again, let us suppose that there are five claimants descended in the fourth degree from three ancestors as in the following scheme:

DECEASED

daughter	daughter	daughter
son	daughter	daughter
daughter	son	daughter
dr. dr.	daughter	son son

The difference of sex here first appears in the second stage, where there is a son with two daughters. The portion of the son being equal to that of both daughters, the estate ought to be divided into four parts, of which two would go to the son, and one to each of the daughters. But the son has two branches, that is, two daughters, among the claimants, and the sex being taken from the root, and only the number from the branches, the single son becomes equivalent to two, and his shares are accordingly raised to four. Of the second daughter there is only one branch; but of the third there are two; namely, two sons in the line of the claimants; and the sex being considered in the root at the first stage, where the difference appears, and the number in the branches, the single daughter in the second stage is equivalent to two daughters and her share is accordingly doubled. The estate is thus divided at the second stage into two lots, one containing four parcels for the sons, and the other three parcels for the daughters. The portion of the son passes without division, till it reaches his two grand daughters, who are each entitled to two parts, while the three parts of the daughters undergo a new division in the third stage, where there is a son and a daughter; but the daughter having two

as the son's, so that three-fourteenths compose the share of each and pass to their respective representatives. The daughter being represented by two sons, her portion must be further divided into two parts, and each will obtain three twenty-eighths; the estate, being divided into twenty-eight parcels, will then be divided thus 8. 8. 6. 3. 3.

4. One related on both sides takes in right of both.

4. The person related on both sides to the deceased, takes in right of both. Thus, if there be a son of a daughter's daughter of the deceased, and two daughters of a daughter's daughter, who are also the two daughters of a daughter's son, the two daughters take in right of their father, sixteen shares, and in right of their mother, six shares; and the son takes only six shares in right of his mother. (Sect. 122.)

Distribution in 2nd class of distant kindred.

In the second class the succession is also regulated by proximity and the condition and sex of the person through whom the succession is claimed when the claimants are related on the same side; when the sides of relationship differ, two-thirds go to the paternal and one to the maternal side, without regard to the sex of the claimants.

For instance, the claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter; but if the first be the father of a maternal grandfather, then the claimants are equal in point of proximity, the side of their relationship is the same, and they are equal with respect to the sex of the person through whom they claim, the only method therefore of making the distribution is by having regard to the sexes of the claimants and giving a double share to the male. (Sect. 123.)

Distribution in the 3rd class of distant kindred.

The same rules apply to the third as to the first class. The rule that brothers and sisters by the same mother take equally without any distinction of sex, (Sect. 112,) does not extend to their issue, the male takes as two females.

Case.

For instance:—Let the deceased have three nieces, surviving him, the daughters of different kinds of brothers, and three nephews and three neices, the children of different kinds of sisters, after the following scheme:

Full br.	full sr.	br. by father	sr. by fr.	br. by mr.	sr. by mr.
daughter	s. d.	daughter	s. d.	daughter	s. d.

Here, 1st. One-third of the property is to be allotted to the descendants of the half-brother and sister by the mother, and divided equally among them on account of the equality of their roots. The sister having two branches, viz. a son and a daughter, is accounted the same as two sisters, and her portion is therefore two-thirds of the third, which accordingly pass to her descendants among whom they are equally divided, and the remaining third of that third, being the portion of the brother, who has only one branch, goes to his daughter.

2nd. Two-thirds of the whole property still remain, which belong to the descendants of the full brothers and sisters, who entirely exclude half-brothers and sisters by the father. (Sect. 111.) The sister here has also two branches, by which means her portion is doubled and raised to an equality with that of her brother. One-third goes therefore to the daughter of the full brother, and the other third is to be divided between the children of the full sister in the proportion of two parts to the son and one to the daughter.

Another case.

Again, suppose the deceased to have left the son of a daughter of a half-brother by the father, two daughters of the son of a half-sister by the father, who are also the children of a full sister's daughter, and the daughter of the son of a half-sister by the mother, as in the following scheme:

h. b. by f.	h. s. by f.	full sister	h. s. by m.
daughter	son	daughter	son
son	two daughters		daughter.

Here first the half-sisters by the mother will take a sixth (Sect. 112); the full sister, having two branches, is accounted the same as two full sisters, and will take two-thirds, and the remaining one-sixth will go to the half-brother by the father as residuary. (Sect. 119,) when his sister would also participate with him, but she has two branches in the present case, and her portion will therefore be equal to her brother's, or each will take one-twelfth. This twelfth of the sister's must again be divided between her two grand daughters, who each will get 1-24th. The $\frac{1}{6}$th of the half-sister by the mother will pass to her granddaughter. The 2-3rd of the full sister will in equal shares go to her granddaughters, who also will each get 1-24th from their other grandmother; and the remaining 1-12th will go to the grandson of the half-brother by the father. (Sect. 124.)

Distribution in the 4th class of distant kindred.

In the 4th class those of the whole blood, are preferred to those of the half blood; and those connected by the same father only are preferred to those by the same mother only, whether they be male or female; if their relation be equal and there be claimants of both sexes, the males will have a share double that of a female. (Sect. 125.)

Case.

Thus a *maternal* aunt by the same father only will exclude a *maternal* aunt by the same mother only, but

if the sides of their relationship differ, for instance, if one of the claimants be a paternal aunt by the same father and mother, and the other be a *maternal* aunt by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation. (Sect. 25.)

Their children.

The succession of the children of the above class, that is, the cousins, is regulated by the following rules: Propinquity to the ancestors is the first rule; where that is equal, the claimant through an heir inherits before the claimant through one not an heir, without regard to the sex of the claimants.

Case.

Thus, if there be the daughter of a paternal uncle and the son of a paternal aunt, both uncle and aunt being of the full blood to the father of the deceased, the former will take the whole estate as being the offspring of a residuary. But if the aunt was of the full blood, and the uncle only of the half blood, the son of the former would be preferred by reason of the strength of propinquity. Some however maintain that the daughter of the paternal uncle by the father ought to have the preference in the supposed case by reason of her being the child of a residuary.[1]

Among claimants on both sides.

When the claimants though equidistant are not related on the same side to the deceased, the one is not preferred to the other, but two-thirds go to the claimants on the father's side, and one-third to those on the mother's side.

And their descendants.

In the distribution among the descendants of this class, the same rule is applicable as to the descendants of the first class. (Sect. 122, No. 3.) Thus the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter

1. Sirajiyyah. Baillie, p. 150.

of a paternal uncle's daughter, supposing the relation of the uncle's to be the same; and in case of equality in all other respects, regard must be had as above to the sexes of the claimants. (Sect. 26.)

In default of them, to the same description of uncles and aunts and their children in the third and following lines.

If there be none of the above mentioned persons (Sect. 121, No. 4) in existence, the estate will revert to the maternal uncles and aunts of the deceased's parents, the paternal uncles of his mother, and such of the paternal uncles of his father as were related to him by the mother only, and their children. Failing them it will revert to the same description of uncles and aunts of the parents of the deceased's parents and their children. And so on to the more remote branches without any limit, the succession being[1] regulated in the same way as in the fourth class. See Sects. 125, 126. (Sect. 127.)

ON THE RETURN (SURPLUS) AND INCREASE (DEFICIENCY.)

On the return.

When on distributing the estate among the legal sharers there is a surplus, such surplus goes to the residuaries; and if there be no legal sharers, the whole estate goes to the residuaries: but if in the first case, there be no residuaries to receive the surplus, that surplus reverts upon that to those legal sharers, who are connected with the deceased by consanguinity. This is called the return. The husband and widow get no share of the return as long as there are any heirs by blood alive, but when the deceased leaves no relative at all, the husband or widow takes the whole estate.[2] (Sect. 128.)

1. Baillie, p. 153. See also Sect. 119. Note.
2. Baillie, p. 3.

If there be only one class of sharers, for instance, only daughters, the return is to be divided according to the number of the individuals; and if there be different classes, each class will get a proportional share, for instance a daughter, a son's daughter and a mother, whose shares are respectively 3-6ths, 1-6th, and 1-6th, the surplus 1-6th will be divided in the same *ratio;* or what is the same thing, the whole estate will be divided into five parcels, of which the first will get three, the second and third each one. (Sect. 129.) How divided.

When on distributing the estate it is found that the sum of the different shares exceeds the whole estate, each of them must suffer a proportional deduction; or, in other words, the number of parcels must be increased. Thus, if the heirs be the husband, two sisters of the whole blood, two sisters by the same mother only and the mother, their legal shares in the order they are mentioned are half, 2-3rds, 1-3rd, and 1-6th, which added together gives 10-6ths; but as ten parcels cannot be paid out of six, the estate must be divided into ten shares; to the husband, three; to the two sisters of the whole blood, four; to the half-sisters, two, and to the mother, one. (Sect. 130.) Deficiency how deducted.

ON IMPEDIMENTS TO INHERITANCE.

There are four impediments under the Mahomedan Law, 1. homicide; 2. slavery; 3. difference of religion; and 4. difference of allegiance.[1] Impediments.

Homicide is only so far an impediment that the slayer is precluded from succeeding to the property of a person whom he has slain, whether it was done intentionally or unintentionally.[2] The other three To inheritance under the Mahomedan Law.

1 *Sirajiyyah.* Baillie, p. 21. *Hedaya,* vol. ii. p. 228; vol. iv. p. 273. Princ. Mahommedan Law, p. 1.

2 *Hedaya,* vol. iv p. 329.

impediments are now abolished; slavery by Act V. 1843, Sect. 3; difference of religion by Reg. VII. 1832, Sect. 9[1]; and difference of allegiance by the subversion of the Mahommedan supremacy.[2]

When an heir is excluded from inheriting on account of disqualification, he is considered as not existing, and the estate is divided accordingly.

ON THE DISTRIBUTION OF THE ESTATE.

How to distribute the estate.

The funeral expenses, debts, and legacies having been paid, the remainder goes to the heirs in the order previously stated. Until a division has legally taken place, the estate is considered to belong to the deceased, so that if there should be any increase to it after his death, such increase is considered a part of the estate to be appropriated to the payment of debts, legacies, &c.[3] The first heirs are the "sharers." Several of these may occur together, and, in order to avoid fractions in the distribution, the estate may, for practical purposes, be divided into certain parcels, of which each of the sharers receives his portion. Thus the legal sharers being a wife and two daughters; the wife's share is 1-8th; that of the two daughters is 2-3rds, which added together make 19-24ths. Now to avoid these fractions the estate is divided into 24 parcels; the first numerator being multiplied by 3 (the deno-

Divide it in several portions.

1 "The laws of those religions—the Mahommedan and the Hindu—shall not be permitted to operate to deprive such party—that is a party of different persuasion—of any property to which, but for the operation of such laws, they would have been entitled."

2 The reason why difference of country is a bar to inheritance is stated in the *Sirajiyyah* to be "the want of mutual protection to the subjects of different states;" as this is only applicable to a state of actual warfare, it cannot be an impediment in the present age. See also Baillie, p. 31.

3 *Hedaya*, vol. iv. p. 6.

minator in the 2nd fraction) gives 3 portions for the wife; and the second being multiplied by 8 (the denominator in the 1st fraction) gives 16 portions for the two daughters, or eight to each; the remaining 5 will go to the residuaries. To find out the number of parcels into which the estate in each case is to be divided, apply the common rules of arithmetic for the addition of fractions. If the denominators are prime, multiply the one by the other; if they be composite, multiply the common denominator of the one by the other, and the product will be the number sought. If any of the shares, or the residue, is to be distributed among several persons, multiply that number or its prime by the product already found.

Apply the common rules for addition of fractions.

Thus, let the heirs be a father, a mother and 10 daughters; their shares in the order stated are 1-6th, 1-6th and 2-3rds, that is, the estate is to be divided into six shares of which the father is to have one; the mother one, and the 10 daughters amongst them, four; but as the four shares cannot be divided among 10 persons without a fraction, either multiply the 4 shares by 5, having separated the shares of the father and the mother, and each daughter will get two portions of the residue divided into 20 shares; or divide the estate at once into 30 shares, of which the father will then take 5, the mother, 5, and each of the 10 daughters, 2.

Case.

Again, let the heirs be two wives, six female ancestors, ten daughters, and seven paternal uncles; then the share of the two wives is 1-8th, of the six female ancestors, 1-6th, of the ten daughters, 2-3rds, and the uncles are the residuaries. Then take the denominators—8, 6, 3,—and seek their common denominator, which is 24, divide this number by the several denominators, and you will get as their respective shares, 3, 4, and 16, which make 23. The residuaries will

Another case.

consequently get one portion, which is what remains of the 24 portions into which the estate has been divided. In order to divide these shares amongst all the parties, take the different numbers, viz. 2, 6, 10, and 7, seek the least common multiple which is 210, multiply that by the shares as previously found, viz. 3×210, 4×210, 16×210, and 1×210, and divide the product by the number of persons, viz. $\frac{3\times210}{2}$, $\frac{4\times210}{6}$, $\frac{16\times210}{10}$, $\frac{1\times210}{7}$. 210 multiplied by 3 gives 630 and divided by two gives 315 shares to each widow: 210 multiplied by 4 gives 840 and divided by 6 gives 140, as the share of each female ancestor; 210 multiplied by 16 gives 3360 and divided by 10 gives 336, as the share of each daughter; and lastly, 210 multiplied by one gives 210 and divided by 7 gives 30, as the share of each uncle. The whole estate has thus to be divided into 24×210 or 5040 shares. (Sect. 132.)

When the distribution takes place after the death of an heir in the interval.

When the distribution first takes place after the death of some of the heirs, there must be as many distributions made as there are persons who have died. Thus, supposing A. dies leaving two widows B. C., four sons D. E. F. G., and two daughters H. I., but the distribution of the estate does not take place until after the death of the two widows and one of the daughters. By his first wife B. the deceased had only one son D., and by his second wife C. one son E. and two daughters H. and I.; his other two sons were the offspring of another woman. The death of the first wife B. occurred before that of the second; and the death of the second before that of the daughter, who left a husband.

Case.

1. First, the estate of A. must be divided among his 2 widows, his 4 sons, and 2 daughters. The widows are entitled to 1-8th; the 4 sons and 2 daughters

as a son's share is that of two daughters, the shares of the 4 sons and 2 daughters are equal to the shares of 10 daughters, the estate must therefore be divided into 80 shares (8×10), of which each widow will get 5; each son, 14; and each daughter, 7.

2. On the death of the widow B. her heir is her only son D., the other children are only her step-children, who of course are not at all related to her. B.'s five shares will therefore go to D., whose shares thereby become increased to 19.

3. On the death of the second widow C. her five shares will go to her son and two daughters E. H. and I., the other children D. F. and G. being only her step-children. The shares of one son and two daughters are equal to the shares of 4 daughters; the 5 shares are therefore to be multiplied by 4, and of these twenty shares, E. will have 10, H. and I. each 5.

4. On the death of the daughter H., she leaves as her heirs her husband K., her full brother E., and her full sister I., D. F. and G. are her half brothers on the father's side, who are excluded by the existence of the brother of the whole blood, (Sec. 119.) As H. left no children, her husband takes one-half of her shares, and E. and I. the other half, in the proportion of a double share to the male. H's shares are therefore to be multiplied by 6, of which the husband takes three parts, the brother E. two, and the sister I. one.

The whole division will therefore stand thus :

(1.) B. 5, C. 5, D. 14, E. 14, F. 14, G. 14, H. 7, and I. 7, of 80 shares.

(2.) C. 5, D. 19, E. 14, F. 14, G. 14, H. 7, and I. 7, of 80 shares.

(3.) For the next distribution the whole must be multiplied by 4. C. 20, D. 76, E. 56, F. 56, G. 56, H. 28, I. 28 of 320 shares, and the shares will stand thus: D. 76, E. 66, F. 56, G. 56, H. 33, I. 33 of 320 shares.

(4.) For the next distribution the whole must be multiplied by 6 :

D. 456, E. 396, F. 336, G. 336, H. 198, I. 198, of 1920 shares, and the shares will stand thus :

D. 456, E. 462, F. 336, G. 336, H. 231, and K. 99 of 1920 shares. (Sect. 133.)

When one heir compounds with the other for his share.

When one of the heirs compounds with the other for his share of the inheritance, by accepting in its stead a certain sum of money or some specific articles, the remainder is to be divided among the other heirs in proportion to their respective shares ; as, when the husband relinquishes his share of the estate of his wife in lieu of his wife's dower, which has remained unpaid and consequently constitutes a debt against him. (Sect. 134.)

When the deceased leaves a pregnant wife.

When the deceased leaves a wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born ; if he has no sons and there are other relatives, who would succeed only in the event of his having no child, (as would be the case for instance with a brother or sister,) no immediate distribution of the property takes place, but if those other relatives would succeed at all events to some portion (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be

not born alive, her portion will be augmented to one-third.[1] (Sect. 135.)

When one of the heirs is missing.

When one of the heirs is missing, that is to say, when he is absent, and there is no certain intelligence whether he be alive or not, he is considered as living with respect to his own estate, and as defunct with respect to the estate of others.

Thus if he had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age (Sect. 82), but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside; but such share is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs, who came into possession at the former distribution, but not to the heirs[2] of the missing person. (Sect. 136.)

Division of profit of endowments.

The profit of endowments for the support or benefit of descendants is not to be divided according to the common rules, but in equal shares amongst them; if one of them dies without heirs, his share will go to increase the share of the others; and if one of them dies leaving heirs, they will take his share in equal portions.[3] (Sect. 137.)

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1 Princ. Mahomedan Law, p. 30. Baillie, p. 156.

2 *Sirajiyyah. Hedaya*, vol. ii. p. 293. Princ. Mahomedan Law, p. 92, 116. Baillie, p. 166.

3 Princ. Mahomedan Law, p. 341.

Office of *Mootwulee* neither divisible nor heriditable but the *Guddy* is.

The office of *Mootwulee*, that is, the superintendence of the *spiritual* affairs of an endowment, is not hereditable, nor can it be entrusted to a female,[1] but the *Guddee* or *Sujjada-Nisheenee*, that is the superintendence of the temporal affairs, is hereditable and may be held by a female.[2] (Sect. 138.)

ACCORDING TO THE DOCTRINE OF THE SHIITES.[3]

On the order of Succession.

The *Shiites* differ from the *Soonnees* with respect to the distribution of the residue.

The *Shiites*, generally called the *Emamiya* sect, recognize the same legal sharers, the same shares, and the same heirs as the *Soonnees*, but differ as to the distribution of the residue. The *Soonnees* prefer the agnate kinsmen, (Sect. 113) but the *Shiites* prefer the nearest kin without reference to sex. (Sect. 139.)

The share of husband and wife.

The husband and wife take their shares as with the *Soonees* in all cases; in failure of heirs, the husband takes the whole estate of his wife; but the wife, under the same circumstances, is only entitled to her legal share, and the residue goes therefore to the public treasury. (Sect. 140.)

First class of heirs.

In the first class of heirs are the parents, the children, and grandchildren how low soever. The children exclude the grandchildren; the grandchildren the great grandchildren without reference to sex; but grandchildren do not take their shares according to the sex of their root; children of sons take the portion of sons, and children of daughters take the portion of daughters. (Sect. 141.)

Second class.

The second class comprises two divisions: 1, the grandfather and the grandmother and other ancestors;

1. Princ. Mahomedan Law, pp. 332, 343.

2. Princ. Mahomedan Law, p. 343; M. Hyatee Khanum *versus* M. Koolsoom Khanum. S. D. A. Rep. vol. i. p. 214.

3. That is *Sheeas*. See Princ. Mahomedan Law, p. 34. S. D. A. R. vol. v. p. 29.

2, the brothers and sisters, and their descendants how low soever. The one division does not exclude the other how distant soever, but the nearest in degree in each division exclude the more distant. (Sect. 142.)

Third class.

The third class comprises the paternal and maternal uncles and aunts, and their descendants, the nearest of whom exclude the more distant. Those of the whole blood exclude those of the half blood in the same degree, and the son of a paternal uncle of the whole blood excludes a paternal uncle of the half blood. (Sect. 143.)

Fourth class.

In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed, and their descendants to the remotest generation according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand parents and great grand parents inherit according to their degree of proximity to the deceased. (Sect. 144.)

On the return.

When, on distributing the estate among the legal sharers, there is a surplus, it goes to the heirs, and if there be no heirs, it reverts to the sharers in proportion to their shares.[1] The husband is entitled to share in the return, but not the wife. Neither is the mother entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual. (Sect. 145.)

And deficiency.

When the different legal shares exceed the estate, the number of parcels is not, as according to the doctrine of the *Soonnees*, (Sect. 130,) to be increased, so that each heir suffers a proportional deduction, but the deficiency is deducted from such heir as may,

1. Rajah Didar Hussein *versus* Ranee Zahurun Nissa S. D. A. Rep. vol. v. p. 29.

under certain circumstances, be deprived of a legal share, or from any heir whose share admits of a diminution. For instance, in the case of a husband, a daughter, and parents; their respective shares being ¼, ½ and 2-6ths or 13-12ths. The *Soonnees* would have divided the estate into 13 portions, of which the husband would have taken 3, the parents 4, and the daughter 6, but the *Shiites* would divide the estate into 12 shares, of which the husband would take 3, the parents 4, and the daughter the remaining 5, as her share is liable to extinction. For instance, if there had been a son, the daughter would not have been entitled to any specific share, but would have become a residuary, whereas the husband and the parents can never be deprived of their legal shares. (Sect. 146.)

Impediments to inheritance.

Of homicide (Sect. 131,) only that which is intentional is a bar to inheritance. Difference of allegiance is no bar according to this sect. (Sect. 147.)

The eldest son entitled to Sword, *Korán*, &c.

In the distribution of the estate there is only this difference, that the eldest son is entitled, if he be worthy, to his father's sword, his *Korán*, his wearing apparel, and his ring. (Sect. 148.)

ON GIFTS.

ON THE REQUISITES TO A GIFT.

What a gift is.

A gift is a transfer of property made without any exchange.[1]

1. *Hedaya*, vol. iii. p. 290, *seq.* Princ. Mahomedan Law, p. 50. Digest, book ii. ch. iv.

Dower is not, according to Mahomedan Law, a gift, but a consideration paid, or stipulated to be paid, for the consummation of marriage; a transfer in consideration of dower is a payment of debt, not a gift, though it may have been called so in the contract. Seisin is therefore not requisite.

Gift for a consideration is a sale.

The donor's resigning his right without receiving any consideration from the donee, is a gratuitous act; should the donee give some, but not full, consideration, the contract is partly a sale, and partly a gift; and if full consideration be given, the contract is a sale, and must be treated as such, though it has been denominated a gift.[1] Thus a *Hiba-bil-Iwuz* is in fact a sale, and therefore valid according to Mahomedan Law, even though seisin (Sect. 258) has not taken place.[2] (Sect. 256.)

According to the Mahomedan Law, seisin is absolutely necessary to the validity of a gift, partly because the Prophet has said: "A gift is not valid without seisin," and partly because gifts are voluntary acts and ought not therefore to be enforced.[3] The seisin is to follow immediately upon the acceptance, yet, when possession is taken afterwards *with* the consent of the donor, the gift is considered valid.[4] If the donee only takes possession for a *short* time, the gift is valid, and continuance of possession is not necessary. For instance, if a wife makes a gift of landed property to her husband, and the husband takes possession of it for a short time by managing the estate in his own name, the gift is valid and irrevocable, though the wife should afterwards manage the estate in her own name.[5] (Sect. 258.)

According to the Mahomedan Law seisin is also requisite.

And must follow immediately upon acceptance.

1. Any consideration, however inconsiderable, will transfer a gift into a sale under the Mahomedan Law; see *Hedaya*, Vol. III. p. 306. Princ. Mahomedan Law, p. 217. Mirza Bibee *versus* Toola Bibee, S. D. A. Rep. Vol. IV. p. 334. Imdad Alee *versus* Kadir Buksh, *Ibid*, Vol, V. p. 296.

2. Meer Nujeeb-ullah *versus* Kuseema, S. D. A. Rep. Vol. I. p. 10. Princ. Mahomedan Law, p. 221.

3. *Hedaya*, Vol. III. p. 292. Princ. Mahomedan Law, p. 215, S. D. A. Rep. Vol. I. p. 5. Casim Alee *versus* Furzund Alee. *Ibid.* Vol. I. p. 113.

4. *Hedaya*, Vol. III. p. 293.

5. Jaffir Khan *versus* Hubshee Bibee, S. D. A. Rep. Vol. I. p. 12.

Conditional gifts invalid under the Mahomedan Law.

All conditional gifts are therefore invalid under the Mahomedan Law; if seisin has taken place, the condition is invalid, and the gift cannot be resumed on account of non-fulfilment of the condition; and if seisin has not taken place, the gift is invalid.[1] Thus, in a gift on the condition that the donee shall support the donor during his lifetime, the gift is valid, but the condition invalid. What has been given can neither be resumed in case of non-fulfilment, nor can the fulfilment of the condition be enforced.

If the property is not to be delivered till after the fulfilment of the condition, and the donee according to the condition is to give or to do something; for instance, if it is contracted between A and B, that A shall take B's property *after* his death, provided A supports him during his lifetime; the contract is not a gift, but rather a sale or a transfer for a consideration, (Sect. 256) which may be enforced after the fulfilment of the condition. (Sect. 259.)

Conditional gifts invalid under the Mahomedan Law.

A gift which is not to take effect till the death of the donor, is invalid, partly on account of a saying of the Prophet, partly because the suspension of the conveyance of the property makes the contract doubtful and uncertain, and therefore null.[2] (Sect. 260.)

WHO CAN MAKE GIFTS.

Who can make gifts. Minors.

Persons of unsound mind.

Every person able to contract,[3] is generally able to make gifts. A minor,[4] or one of unsound mind,[5] cannot make gifts. Sickness and even mortal disease does not make a gift void, if the donor at the time was of sound mind; [6] a

1. *Hedaya*, Vol. III, p. 308. Princ. Mahomedan Law, pp. 80. 214.

2. *Hedaya*, Vol. III. p. 130.

3. Colebrooke, Contracts and Obligations, Sects. 52 to 65.

4, 5. *Hedaya*, Vol. III p. 471.

6. *Hedaya*, Vol. IV. p. 503. By Mahomedan Law a gift on the death-bed, (that is, made during an illness from which the donor does not recover) is viewed in the light of a legacy. Vol. III. p. 162. Vol. IV. p 503.

married woman both under the Mahomedan and the Hindoo Law, can make gifts of her own property without her husband's consent. [1] (Sect. 262.)

Married women.

There are no restrictions with respect to gifts to wife, children and relatives, they are rather looked upon favorably, as their object is increase of affection.[2] It is considered improper to give more to one child than to another, but it is not illegal,[3] and even if such gifts should afterwards be found to have been detrimental to the interest of the creditors of the donors, they are valid,[4] provided they were made in good faith, and not to deceive the creditors.[5] (Sect. 263)

No restrictions for gifts to wife, children and relatives.

WHO CAN RECEIVE GIFTS.

Every person who is of sound mind, can receive a gift, whether he be of age, or a minor, if he is only able to declare his acceptance thereof; and as the contract is beneficial to the donee, the father or mother can accept a gift for their child,[6] and the guardian for his ward, if they are unable to give their assent.[7] (Sect. 269.)

Who can receive gifts.

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1. Princ. of Mahomedan Law, pp. 154,254.
2. *Hedaya*, Vol. III. p. 302. Princ. Mahomedan Law, pp..198, 237.
3. Princ. Mahomedan Law, p. 226.
4. S. D. A. Rep. Vol. I. p. 152. note.
5. *Hedaya*, Vol. IV. p. 475.
6. The father or mother can even, under the Mahomedan Law, make gifts to *their* infant children of things in their possession, the father or mother takes seisin, as the guardian of his or her children. *Hedaya*, Vol. III. p. 296. Princ. Mahomedan Law, p. 232.
7. *Hedaya*, Vol. III. p. 297. Princ. Mahomedan Law, pp. 206, 212, 224. It has now been decided, that a stranger, in whose house the minor resides, can accept for the minor, *even* when the father is alive. Banoo Bibee *versus* Fukeerooddeen Hosen, S. D. A. Rep. Vol. II. p. 180.

ON GIFTS.

WHAT CAN BE THE SUBJECT MATTER OF GIFTS.

What can be the subject matter of gifts.

Not only the thing itself, but the use and possession thereof may be given. No one can of course give away what does not belong to him,[1] nor more than that which belongs to him.[2] (Sect. 270.)

Future things.

Things, which are not yet in existence, but are future or expected to exist hereafter, may be the subject of a gift under the Hindoo Law, but not under the Mahomedan Law as seisin cannot take place.[3]

An heir can neither under the Mahomedan Law nor under the Hindoo Law make gifts of, or from, an inheritance in expectance. Under the Mahomedan Law such gifts would be invalid both because seisin cannot take place, (Sect. 258) and on account of uncertainty, (Sect. 274,) and under the Hindoo Law, such gifts would be invalid as being contrary to the reason and intent for which the inheritance devolves upon the heir. (Sect. 271.)

Things, not in the donor's possession.

Things not in the possession of the donor, though belonging to him, may be the subject of gifts, under the Hindoo Law, for instance a thing mortgaged, lent out, or sued for in the Court, but not under the Mahomedan Law, as the donor cannot deliver the thing to the donee, not having actual possession thereof.[4] (Sect. 272.)

Rights, demands, &c.

Things incorporeal, as a right, a demand, an expectancy, except the expectancy of an inheritance, (Sect. 271) may be given away, provided the right is not a mere personal

1. *Hedaya*, Vol. III. p. 292.

2. If a co-sharer make a gift of more than his share the gift is valid to the extent of the giver's share. Princ. Mahomedan Law, p. 208.

3 *Hedaya*, Vol. III. p. 295. Princ. Mahomedan Law, p. 50, 204. A gift of what "he then possessed or might possess hereafter," is therefore invalid as to the last part. Musnudally *versus* Khoorshed Banoo, S. D. A. Rep. Vol. I. p. 52. Ahmudollah *versus* Behar-ollah, *Ibid*, Vol. I. p. 284.

4. Princ. Mahomedan Law, p. 200.

one. Under the Mahomedan Law, it is necessary that the right should be of such a nature that a delivery can take place. A bond for instance, can be given away by the conveyance of it to the donee. (Sect. 272.)

Joint and divisible property under Mahomedan Law.

Property held jointly with others may, according to natural law, be given away on the same conditions as property held separately, but as seisin is an absolute requisite to the validity of a gift under the Mahomedan Law, and as a complete seisin is impracticable with respect to an indefinite part of divisible things, and as, in case gifts without separation were lawful, it would be incumbent upon the giver to make a division, which he has not engaged for, not only gifts of joint property, but of a part of a divisible property, are invalid under the Mahomedan Law without a previous separation or division. [1] (Sect. 274.)

Joint property must be divided under Mahomedan Law.

A gift by one co-sharer of *his* share to a partner, or to a stranger, is thus invalid without previous division ;[2] yet if a partner gives his whole share to his sole co-partner, prior division is unnecessary, as no uncertainty exists in that case.[3]

Except.

By the doctrine of the *Shia* sect, a gift of immoveable, and not deliverable, property is valid without a division, as the Doctors of that school consider proprietary right in these cases to arise from abandonment by the donor, and not as with moveable and deliverable things from delivery and transfer.[4] (Sect. 275.)

1. *Hedaya,* Vol. III. pp. 293, 298.

2. *Hedaya,* Vol. III. p. 294. Azeemooddeen *versus* Fatima Bibee, S. D. A. Rep. Vol. I. p. 24. Banoo Bibee *versus* Fukeeroodeen Hosen, Vol. II. p. 180.

3. Princ. Mahomedan Law, p. 212.

4. Mirza Kasim Alee *versus* Mirza Mahommed Hosen, S. D. A. Rep. Vol. V. p. 213.

ON GIFTS.

Divisible property must be divided under Mahomedan Law.

A gift made by the sole owner of parts of a divisible property, for instance, of a landed estate to several persons without prior division, is invalid, even if the donor had empowered the donees to divide the property, and a division had taken place immediately after;[1] Yet if the donees are poor, the gift will be valid without a division, being considered as an alms (a gift to God, who is one,)[2] and, upon the same principle, a gift of an unseparated part of a divisible property for the maintenance of the donee, is held to be valid.[3] (Sect. 276.)

Except.

Gift of shares of indivisible property is invalid.

Indivisible property, for instance, a house, cannot be given away to two or more persons in *distinct shares*, as a mixture of property would thereby be created. Such a gift as this. "I give a moiety of the house to A, and a moiety to B," is therefore invalid; but if the conveyance is indiscriminate, as: "I give the house to A and B," the gift is valid, and each takes a moiety according to *Aboo Yoosuf* and *Futwas*, because in this case there is only one conveyance.[4] (Sect. 277.)

ON PIOUS GIFTS.

Pious and charitable gifts what?

The determination of what are, and what are not, pious or charitable gifts, and their relative importance, depends of course on the tenets of the different religions, and should be determined accordingly.[5] (Sect. 282.)

1. Khanam Jan *versus* Jan Bibee S. D. A. Rep. Vol. IV. p. 210. Mir Nur Alee *versus* Majidah, *Ibid*, Vol. V. p. 136.

2. *Hedaya*, Vol. III. p, 299.

3. Princ. Mahomedan Law, p. 211.

4. *Hedaya* Vol. III. pp. 298 to 299. Musst. Hyatee Khanum *versus* Musst. Koolsoom Khanum, S. D. A. Rep. Vol. I. p. 214.

5. *Hedaya*, Vol. IV. p. 534.

ON GIFTS.

According to Mahomedan Law.

The Mahomedan Law distinguishes between those gifts which are incumbent upon the donor as referring to the five primary duties : purification, prayer, alms, fasting and pilgrimage, and those, which are voluntary, as the erection of a mosque, of a retreat for travellers, or of a bridge and the like ; the first being made for the performance of religious duties immediately enjoined by God, the others for benevolent purposes amongst mankind.[1] The giving of alms is especially enjoined on all true believers, as an ordinance of God.[2] But in all other respects pious gifts are subject to the same rules as other gifts.[3] Except that alms-gifts cannot be retracted.[4] Gifts upon death-bed for charitable purposes have no preference over other gifts.[5] And are only valid, as far as they are within the one-third which a Mussulman can legally bequeath. (Sect. 282.)

No preference for other gifts.

ON THE FORM OF A GIFT.

To distinguish a deed of gift from other agreements and contracts, the word "*Hibbah*" or "*Dan*" should be used, and to prevent any uncertainty, as to what has been given, the thing should be properly described and defined, and the name, situation and boundaries of landed property should be stated yet when the property is sufficiently known by its name and situation, and the boundaries are undisputed, the non-definition of the limits will not affect the validity of the deed ; and if the gift conveys all the property of the donor, a specification of it is unnecessary.[6] Any

1. *Hedaya*, Vol. IV. p. 514.
2. Koran, Ch. IX. (Sale, p. 145.) *Hedaya*, Vol. I. p. 1.
3. *Hedaya*, Vol. II. p. 335, Vol. III. pp. 291,310.
4. *Hedaya*, Vol III. p. 310.
5. *Hedaya*, Vol. III. p. 109.
6. Princ. Mahomedan Law, pp. 209,210.

Interpretation.

uncertainty in a gift must be interpreted against the donee, as the contract is gratuitous. If there be uncertainty in any essential part, the gift will be invalid under the Mahomedan Law.[1] (Sect. 285).

ON THE EFFECT OF A GIFT.

Of unconditional gifts.

If the gift was unconditional, the donee becomes the proprietor of the thing from the moment the gift was accepted, and he, or his representative, may enforce delivery of the thing given from the donor, or, after his death, from his representative, (Sect. 261, notes ;) but under the Mahomedan Law, the donee becomes the proprietor only from the moment the seisin took place. (Sect. 258.) Any disposal of the thing, given by the former owner after the acceptance of the promise under the Hindoo law, and after the seisin of the property under the Mahomedan Law, is illegal and invalid. (Sect. 286.)

Of conditional gifts.

If the gift was conditional, the conditions are void under the Mahomedan Law ; (Sect. 259,) but under the Hindoo Law the donee is entitled to demand delivery of the thing after fulfilment of the conditions (Sect. 661) and the donor is responsible for all deterioration caused by his neglect or fraud to the thing, until its delivery.

Gift is to take effect after the death of the donor.

If the gift is to take effect after the death of the donor, it is invalid under the Mahomedan Law.[2] (Sect. 286).

Gifts are irrevocable.

A gift once legally made cannot be revoked without the consent of both parties, yet as presents to *strangers* are made in expectation of a return, either in things or services, a retraction by the donor, but not by his heirs, of a gift to a stranger—though improper—is valid. Under the Mahomedan Law, however, this right is barred: 1st, when a return is given ; 2nd, when the donee has alienated the

Exception.

1. S. D. A. Rep. Vol. I. p. 224

2. *Hedaya*, Vol. III. p. 300

thing, and improved or altered it, for instance, planted trees in the ground, built a house, &c.; 3rd, by the death of the donee, or the destruction of the thing given.[1] (Sect. 287.) Exception.

Gifts to kinsmen, to a husband, or to a wife during marriage, cannot be revoked under the Mahomedan Law, as their object was increase of affection; but gifts to a son may be revoked at any time, as the father has power over the property of his son.[2] Alms are irrevocable, as their object is merit in the sight of God.[3] Gifts to sons are revocable.

When by a deed of gift several things are transferred, and the gift of some is valid, of some invalid, the whole gift is not invalidated by the invalid part; but the valid part will remain valid and have legal effect.[4] Gifts only partly valid have legal effect so far.

The Mahomedan Law goes still further, so that a gift, which would have been *wholly* invalid, if a particular fact had been known at the time of the gift, remains partly valid, if such fact first became known afterwards.[5] For instance, when a gift is made of landed property, and another person is afterwards found entitled to a share, the gift is valid to the extent of that part to which the donor is found entitled.[6] If it had been known at the time of the Gift that the donor was only entitled to a share, the gift would have been invalid, on account of indefiniteness, no division having taken place prior to the gift: (see Sect. 276,) but as this fact first became known afterwards, the donee retains the share belonging to the donor. (Sect. 289.)

1. *Hedaya*, Vol. III p. 300. Shah Makdum Buksh *versus* Luft Alee, S. D. A. Rep. Vol. V. p. 355. Princ. Mahomedan Law, p. 224.
2. *Hedaya*, Vol. III. p. 300.
3. *Hedaya*, Vol. III. p. 301.
4. Princ. Mahomedan Law, p. 201.
5. Princ. Mahomedan Law, p. 208,
6. M. Hyatee Khanam *versus* M. Koolsoom Khanam, S. D. A. Rep. Vol. I. p. 214, see also p. 115.

Donor not bound to warranty.

As a gift is a gratuitous contract, the donor is not bound to warranty.[1] Thus if a man makes a present to another of a gold watch, and the watch is found to have been stolen, and is recovered by the real owner, the donee cannot sue the donor for damages ; or, if for instance, a gift is made of a horse, and the horse is found to have some internal defect, the donee is not liable to pay damages for this defect; but in case the gift was made with the previous knowledge of any of those facts with the intention of causing some injury to the donee, the donor will of course be liable to damages, not as a compensation for the gift, but as a compensation for the injury caused by a voluntary and intentional Act. (Sect. 290.)

Donee not accountable for mesne profits.

The donee is neither accountable for the profits accruing during his possession, nor for deterioration, but he is entitled to restitution for augmentations, in case the gift, as invalid, be set aside, because he had possession under a title, believed by him to be good.[2] Should he be a party to a fraud, and hold possession with bad faith, he will of course be accountable for profits, &c. (Sect. 291.)

ON WILLS AND CODICILS IN GENERAL.

A will is termed a legal declaration.

A will is generally defined to be the "*legal declaration* of a man's intentions," because if it be not made and attested with the forms and solemnities required by the Law, it is not considered as the will of the party by whom it purports to be made, but is wholly null and void. This holds good only with respect to wills under English Law. Neither the Mahomedan Law nor the Hindoo Law prescribes any form or solemnity for making or attesting a will, it is suf-

1. *Hedaya,* Vol. III. p. 306.

2. *Hedaya,* Vol. II. p. 460. Banoo Bibee, V. Fukeeroodeen Hosen, S. D. A. Rep. Vol. II. p. 180. Princ. Mahomedan Law, p. 239.

ficient that it can be proved to have been really and truly the will of the testator. (Sect. 293).

WHO CAN MAKE A WILL UNDER THE MAHOMEDAN LAW.

Who can make a will under the Mahomedan Law.

According to the Mahomedan Law, an owner has a perfect right to dispose of his property during his lifetime, but this right ceases on his death, and his property devolves upon his heirs. He can make gifts to the full extent of his property during his lifetime, but the acceptance must be immediate, and he is not allowed to postpone its effect, (Sect. 259.) The right of making gifts ceases even before his death, as a gift made upon his death-bed beyond a third of the clear residue of his state, after the payment of funeral expenses and debts, is invalid, without the sanction and consent of his heirs *after* his decease,[1] according to this principle a bequest of property, which is first to take effect on the decease of the proprietor, would be invalid, as the right of the proprietor over his property has at that time ceased, yet the Law permits it for a special reason, viz., " to enable the proprietor to make up for former deficiencies by means of his property,"[2] but restricts it to one-third of the clear residue, after the payment of funeral expenses and debts.[3]

Under these restrictions every person who is able to contract, is also able to make a will. The husband's consent to the will of his wife, is not required, as she is perfect owner of her own property. A will made during minority is invalid, even if the testator should die after attaining his majority.[4] (Sect. 294.)

1. *Hedaya*, Vol. III. p. 162, Vol. IV. p. 503.
2. *Hedaya*, Vol. IV. p. 469.
3. *Hedaya*, Vol. IV. p. 469. S. D. A. Rep. Vol. I. p. 150.
4. *Hedaya*, Vol. I p. 477, Vol. IV. pp. 476, 477.

ON WILLS.

IN WHAT MANNER A WILL IS TO BE MADE AND ATTESTED UNDER THE MAHOMEDAN LAW.

How a will is to be made and attested under the Mahomedan Law.

A will may be made either verbally—a nuncupative will, or in writing; when satisfactorily proved, both have the same effect.[1] (Sect. 297.)

A verbal will how far effectual.

Though a verbal will is as valid as a written one, yet it follows from the nature of a will as a *revocable* declaration, that if the testator does not die so soon after the declaration, that it would be unreasonable to suppose him to have altered his intentions the verbal will is wholly without effect, because the testator may afterwards have altered his intentions.

The disposition must be made by words spoken with an intent to bequeath and not in a loose discourse, and the testator must require the by-standers to be witnesses to his intentions. If the witnesses should depose to the fact a long time after the death of the testator, their evidence may be objected to, as the exact words may have escaped their memory. (Sect. 298.)

Form of a written will.

A written will may be written upon unstamp paper (Reg. 10, 1829, A. 46,) and should either be written by the testator him self, or at least be signed or acknowledged by him, in the presence of two credible and uninterested witnesses called in for the purpose.

It is not also absolutely necessary that the witnesses should be made acquainted with the contents of the will as the witnesses are only required to prove that the document contains "the will" of the deceased, and not to prove its contents, which can be known from the document; but as this is some what unusual, it is proper in such cases, that the witness should, on signing the will, add that the contents are unknown to him. (Sect. 299.)

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1. *Hedaya*, Vol. I. p. 463. Princ. Mahomedan Law, p. 53.

ON WILLS.

HOW A WILL MAY BE ANNULLED REVOKED OR ALTERED.

How a will may be annulled, revoked or altered.

A will is in its very nature a revocable instrument. Even if the testator should in the most solemn manner have declared that his will was to be irrevocable and unalterable, still he is at liberty to revoke or alter it. (Sect. 307).

The revocation of a will, or of a bequest, may either be express or implied.[2] *Express*, by executing another will, or codicil, or some writing, declaring the revocation thereof, or by destroying the will, or causing it to be destroyed *with the* intention of revoking it. Act 25, 1838. Sect. 16. *Implied* by any Act of the testator arguing his retraction.

The revocation of a will maybe express.

Or implied.

Under the Mahomedan Law, it is considered an implied revocation, when the testator creates an addition to a legacy in such a manner, that the legacy cannot be separately delivered, as by building a house on a piece of ground, or when he causes an extinction of the proprietary right of the testator ; for instance, by selling it, making a gift of it, &c., when, in case the testator repurchases the thing, or retracts the gift, the thing will not go to the legatee. (Sect. 308.)

Implied under the Mahomedan Law.

ON THE EFFECT AND INTERPRETATION OF A WILL UNDER THE MAHOMEDAN LAW.

As a will does not take effect till the death of the testator, all its dispositions must be construed as if the will had been executed immediately before the death of the testator; the intention of the testator must be followed, as far as it is in conformity with law, or at least is not contrary to law ; and if one part should be invalid or illegal, the whole will not be affected ; but that part which is legal is to be carried into execution.[3] (Sect. 309.)

Wills under the Mahomedan Law take effect on the death of the testator and must be construed accordingly.

The valid part takes effect.

(Mahomedan Law,) *Hedaya*, Vol. IV. p. 473.

2. *Hedaya*, Vol. IV. p. 479, Princ. Mahomedan Law, p. 54.

3. *Hedaya*, Vol. IV. pp. 475, 495. Princ. Mahomedan Law, p. 54, 243.

Bequests can only be made in favor of strangers.

The right of each heir, under the Mahomedan Law, to a certain share of the estate is unalterable, on account of this saying of the Prophet. "Verily God has bestowed on each his own peculiar right." No bequest therefore in favor of a person, who at the time of the death of the testator is one of his heirs, is valid, without the assent of the other heirs after the death of the testator. Bequests can only be made in favor of a stranger (that is, of one who is not an heir) and of one-third of the clear surplus of the estate, after the payment of funeral expenses and debts.[1] (Sect. 310.)

Are not to exceed one-third of the surplus of the estate after payment of the debts and funeral expenses.

If the testator bequeathes more than the one-third, either at once, or at different times, and the heirs refuse their consent, all the legacies being equally good, each legatee must suffer a proportional deduction.[2] Thus, if one-third of the property is bequeathed to one person, and one sixth to another, the legal third will be divided into three parts, of which the first will receive two, and the other one.

Case.

Or, if a piece of ground valued at 2,000 rupees was bequeathed to one, and a shawl valued at 200 rupees to another, and the legal third amounted only to 1,100 rupees; the first would be entitled to the ground on paying to the estate the difference in value, 1,000 rupees, and the second would receive the shawl on paying 100 rupees, or, if they did not choose to receive the things on this condition, the heirs might take them on paying to the legatees their proportional share, viz., to the first 1000 rupees, and to the second 100 rupees; or, the things must be sold, that the legatees, as well as the heirs, may obtain their rights. (Sect. 311.)

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1. *Hedaya*, Vol. III. p, 165, Vol. IV. pp. 470. to 472.

Hedaet, Alee Khan- Tanjun and others S. D. A. Rep. Vol. V. p. 287. Princ. Mahomedan Law, pp. 55, 248.

2. *Hedaya*, Vol. IV. p. 482.

The restriction to one-third is only given with reference to the legal rights of the heirs (Sect. 310.) If therefore the testator has no heir, he may bequeath his whole property. (Sect. 94.) (Sect. 311.)

If he has no heir he may bequeath the whole.

Within the one-third, the testator may not only bequeath things actually in his possession, but also things not in his possession, and even not belonging to him, in which case it is the duty of the executor to obtain the thing, if he can, and deliver it to the legatee, as far as it comes within the disposable part of the estate ; or to pay its value. The testator may also bequeath a thing held in partnership with others, or he may give one thing to several individuals, without separating or defining the portion of each.

Future, joint and divisible things may be bequeathed.

When the testator bequeathes a thing not in his possession, he must of course state, that the thing is to be acquired and given, otherwise the bequest is null. Thus, if he bequeathes a horse to a person, and there is no horse in his estate on his death, the legatee receives nothing ; but if he says, that out of my property a horse is to be given to B. : then a horse must be bought and given, or its value paid to the legatee.[2] (Sect. 312.)

To prevent the testator from disposing of more than the legal one-third by making the bequest, under another form, all contracts, as gifts, a sale for an undervalue, a purchase for an overvalue, an acknowledgement of debt, of dower, contract of hire, security, &c. made by him *on his death-bed*, are considered in the light of bequests, and take effect only to the extent of the one-third.[3] And an

Gratuitous contracts on death-bed are viewed as bequest.

Hedaya Vol. IV. p. 492, Princ. Mahomedan Law, p. 54.

2. *Hedaya* Vol. IV. pp. 491, 527. Princ Mahomedan Law p. 242, Note 246,

3. *Hedaya*, Vol. IV. pp. 503, 507.

acknowledgment of debt in favor of an heir takes effect only with the consent of the other heirs.[1] (See Sect. 310.)

The legally contracted dower and debts must of course be paid to the extent of the whole property, but if there is no other proof than the acknowledgment of the deceased, and the heirs object, the acknowledgment will only give validity to the extent of the legal one-third.[2] (Sect. 313.)

A will must be interpreted by the same rules as a contract.

When the words, or sentences in a will are ambiguous, they should be interpreted and construed in the same manner as in a contract, so as to give effect to the real intention of the testator, as far as it is in conformity with Law[3]; for instance, in a bequest thus: "I bequeath to A. *and* B. my house." If A. dies before the testator, B. will take the whole house because, as the bequest was made indiscriminately, it must have been the intention of the testator, that these two persons should, in whatever manner, enjoy the whole; but if the bequest was made thus: "I give to A. and B. my house to enjoy the same in equal shares," then it must have been the intention of the testator, that each should enjoy a moiety, and, if A. dies before the testator, his moiety lapses to the estate.[4] (Sect. 314.)

Unaccepted bequests are not hereditable.

A bequest, to a person without any clause that the bequest shall go to his heirs, in case he should die before the testator, becomes void, when that event happens, because the legacy has not yet become the property of the legatee, and the testator has not willed that it should go to his heirs; [5] but if the legatee survives the testator,

1. *Hedaya*, Vol. IV. p. 504.

2. *Hedaya*, Vol. IV. p. 494.

3. Colebrooke's Contracts and Obligations, Sect. 140 and seq. *Hedaya*, Vol. IV. p. 528 & Seq.

4. *Hedaya*, Vol. IV. p. 491. Princ. Mahomedan Law, p. 54.

5. *Hedaya* Vol. IV, pp. 491, 524, 528.

for, however short a period, the legacy will go to the estate of the legatee, though he had not expressly accepted it before his death, as his acceptance is implied from his not having rejected it.[1] (Sect. 315.)

Pious bequests have no preference.

Bequests for pious purposes (Sect. 282) have no preference over other bequests; altogether they are not to exceed the one-third; if they do, all of them must suffer a proportional deduction. (Sect. 310,311.)

If the bequests are made for the performance of several religious *duties*, those made for the performance of duties absolutely incumbent, are first executed, whether the testator has mentioned them first or not, but with regard to those of which the object is not incumbent, the arrangement of the testator is followed, and every distinct duty is considered as a different legacy, as each has its own object.[2] (Sect. 316.)

ON SALES.

ON THE REQUISITES TO A SALE.

A sale is a transfer for a consideration.

A sale is transfer of property for a certain price. A transfer of goods for goods is called barter or exchange.

To establish a sale it is necessary that a consideration should be given in exchange for the thing, otherwise it is a gift. If full consideration is not given, it is in its nature partly a gift, partly a sale, but as it is not necessary to the validity of a sale, that the value of the thing should be equal to the price given, any consideration, however inadequate, will generally make the contract to all effects a sale. Whether a contract is a gift, or a sale depends therefore upon the consideration, not upon the name, by which the contract is called. A *Hiba-bil-Iwuz* is a sale, and a

1. *Hedaya*, Vol. IV. p. 475.
2. *Hedaya*, Vol. IV. p. 514. & seq.

Dan-putro by which a thing was given for a consideration, would be a sale, and ought to be treated as such (see Sect. 256.) (Sect. 326.)

A sale is rendered valid by tender and acceptance.

A sale like other contracts is rendered valid, by tender and acceptance, and may either be effected so that the delivery of the thing, and the payment of the price, shall take place immediately and unconditionally, or, that the one, or the other, or both, shall be postponed until a future time, or, be dependent upon certain conditions. (Sect. 327.)

Consent either express or implied.

The consent of the parties may either be given in express words, or by implication, for instance, by the delivery of the thing, and acceptance of the price. As the contract involves an offer from the one party, and its acceptance or refusal by the other, a reasonable time must be allowed to the other party to accept or refuse.

Tender when to be accepted.

If no time has been agreed to for that purpose, the acceptance must take place before the other party leaves the meeting, otherwise the offer becomes void, and, if the offer was made by letter or message, it must be accepted by the first post-day, or before leaving the place where the message was received.[1]

When time has been given for consideration, but without specifying its extent, it is understood to be three days,[2] as being the longest term generally necessary for consideration. This condition is often expressed by implication, as when the purchaser promises to pay the price agreed on without any stipulation as to time, and then to receive the thing ; in this case, if the money be not paid within three days, either because the purchaser cannot or

1. *Hedaya*, Vol. II. p. 362.
2. *Hedaya*, Vol. II. p. 381.

will not, the sale becomes null, and the seller may sell to another.[1]

When a specific time for consideration has been agreed to, the parties are respectively bound by their engagement, till the expiration of the term, whatever may have been its length. The seller cannot within that period sell the thing to another, and the purchaser is obliged to pay the price offered, if the seller agrees to accept it.[2] (Sect. 328.)

Parties cannot retract.

As soon as the parties are agreed, whether the agreement has been reduced to writing or not, it is binding on them and cannot be revoked,[3] unless in case of a defect in the goods, (Sect. 400) or their not having been inspected.[4] The instant delivery of the goods is not essential to the validity of the contract, but inspection is necessary, as a consent without that is nugatory.[5]

Exception.

Right of inspection.

The option of inspection continues in force to any extent of time after the contract,[6] unless it is expressly or implicitly waived, as by selling, mortgaging, or in any other way disposing of the thing,[7] the acceptance by an agent, is equivalent to the inspection by the purchaser,[8] and the inspection of a part, or a sample, is equivalent to the inspection of the whole, provided the goods correspond with the sample.[9] (Sect. 329.)

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1. *Hedaya*, Vol II. p. 382.
2. According to the opinion of *Aboo Huneefah* and *Aboo Yoosuf*, *Hedaya*, Vol. II. p. 382, it is not lawful to stipulate for more than three days, but according to Mohummed, it is lawful, and this opinion is prevalent in this country, see S. D. A. Rep. Vol. I.p. 57. Note.
3. *Hedaya*, Vol. II. pp. 361, 380.
4. *Hedaya*, Vol. II. pp. 381, 397.
5. *Hedaya*, Vol. II. p. 398.
6. *Hedaya*, Vol. II. p. 398.
7. *Hedaya*, Vol. II. pp. 398, 405.
8. *Hedaya*, Vol. II. p.400.
9. *Hedaya*, Vol. II. p. 399.

Payment and delivery may be postponed.

The payment of the price, or the delivery of the thing, or both, may be postponed to a future time. According to the Mahomedan Law, it is necessary to the validity of a sale, that the time should be certain and determinate, and that, whenever a specific and extant thing is sold for immediate payment, the thing should be delivered at the time. In the first case, when, for instance, the delivery is to take place at the time of sowing or ripening, the sale is declared invalid on account of uncertainty;[1] and in the second, when, for instance, the delivery is to take place a month after, it is said, that there is no occasion for such delay, the thing being extant, and the payment having taken place,[2] as however there is nothing naturally improper in such a condition,[3] such agreements are now legal and valid (Sect. 10,) a sale on condition of delivery at the time of sowing or ripening, will become complete, as soon as that time is over, because though it cannot be said on what exact day the delivery is to take place, it is certain, that the seller is in default as soon as the ripening or sowing time is over. (Sect. 330.)

Conditional sales under the Mahomedan Law.

Under the Mahomedan Law, all conditions that are natural to a sale are valid,[4] but it is illegal to stipulate for conditions.

1. *Hedaya*, Vol. II. p. 364. Princ. Mahomedan Law, p. 44.
2. *Hedaya*, Vol. II. p. 450,
3. Colebrooke's Contracts and Obligations, Sect. 202.
4. There are five kinds of conditions in contracts of sale under the Mahomedan law: 1st, option of acceptance; 2nd, optional conditions; 3rd, option of determination; 4th, option of inspection, 5th, option on the discovery of a defect. An option of acceptance is a liberty which either of the parties, in a contract of sale, has of withholding his acceptance, after the tender of the other, until the breaking up of the meeting. An *optional condition* is where one of the parties stipulates for a period of three days before he gives his final assent to the contract. An *option of determination* is where a person, having purchased one out of two, or three homogenous things, stipulates for a period to enable him to fix his choice. *Option of inspection* is the power which the purchaser of a thing unseen has of rejecting it after sight. *Option on the discovery* of a defect, is the power which the purchaser has of dissolving the contract on the discovery of a defect in the merchandise. *Hedaya*, Vol. II. p. 380, Note.

1st. Which are advantageous to either of the parties; for instance, that the seller shall reside in the house some time after it has been sold. Conditions of this nature are however often valid by custom and precedent; [1] thus in purchasing unfinished work, it is customary to stipulate that the work shall be finished before delivery, and such a condition is valid.

2nd. Which are repugnant to the requisites of a sale; for instance, that the purchaser shall not sell the thing, that the purchaser shall make a gift of it to another person, &c.

3rd. Which involve the subject of another contract; for instance, that the seller shall reside in the house, which he is selling, on payment of a certain rent, or, that the purchaser shall maintain the seller, or certain other individuals.

Whenever such conditions have been stipulated, it is *not the conditions*,[2] but the sale, that is *invalid*; and, *previous* to the delivery, either of the parties has power to annull the sale, in order that the invalidity of it may be removed. None of them can consequently enforce the contract in any Court of Justice; only, if the purchaser should have paid a part of the price, such payment may be recovered. *After* delivery only the party stipulating for the invalid condition, or his representative, is empowered to annull the contract, but not the other party.[3] Thus if A. sells a house to B., on payment of a certain price, and *on condition*, that B. shall maintain him during his natu-

1. *Hedaya*, Vol. II. p. 446.

2. *Hedaya*, Vol. II. p. 455. In the case Mirza Bibee *versus* Toola Bibee, S. D. A. Rep. Vol. IV. p. 334, there is a *Futwa* to the effect, that the conditions in an invalid conditional sale are null and void, but do not vitiate the sale, which is incorrect.

3. *Hedaya*, Vol. II. p. 455.

ral life, and B., having taken possession of the house and paid the purchase money, refuses to fulfil the condition; the sale is invalid, because the condition is a perfectly distinct engagement, and ought not to have been stipulated for in the sale contract. A., who is the party who has made the stipulation, is at liberty to annull the contract and recover the house on returning the purchase money, but B., who is not the stipulating party has no right, under plea of its being an invalid sale, to recover the purchase money and return the house. A. cannot enforce the invalid condition, that is to say, he cannot recover his maintenance from B., under the deed, and if he is unable or unwilling to repay the purchase money, the sale will remain in force, as if the sale had been unconditional, and he has no remedy.[1]

Right of pre-emption and of redemption.

The right of pre-emption and the right of redemption are one of the most common conditions in a sale. Under the Mahomedan Law the first should always be provided for in a separate contract; the last cannot be stipulated for *in* the deed of sale for a longer period than three days,[2] but in a separate agreement, it may be agreed upon for any length of time.[3] When no limit is mentioned in the agreement, it will not be barred by lapse of time

1. In the case Mirza Bibee *versus* Toola Bibee, S. D. A. Rep. Vol. III. p. 334, a sale of certain Talooks had been contracted for on the condition, that the purchaser should manage and enjoy possession of the property during her lifetime, but without the power of alienating it by sale or gift, and should support and educate certain children, to whom the property was to go on the death of the purchaser. The suit was instituted only to uphold the validity of the conditions, and it was decided that, under the Mahomedan Law, the conditions were invalid, no demand was brought for the restitution of the consideration, which had been paid, to which the heirs of the seller, undoubtedly were entitled.

2. See note. 4. (page 53.)

3. Beharee Laul *versus* Sookhun S. D. A. Rep. Vol. IV. p. 174.

under the rules of limitation.[1] This right is generally stipulated for under form of a mortgage by a *by-bil-wufa.* viz., a mortgage for the security of money lent on the condition, that if the money is not repaid within a certain time, the property mortgaged shall become the property of the mortgagee, for the sum lent.

A purchaser under an invalid sale may legally sell the thing.

If the purchaser takes possession of the article under a conditional sale, and then sells it, the second sale is valid, because such conditional sales are legal in their essence, and invalid only on account of their form, and the first seller's right to annull the sale and recover the thing on repayment of the price, is lost.[2]

On the death of the seller, the right of annulling the sale devolves on his executor, heirs or creditors, but neither can they resume the goods from the purchaser until they restore the purchase money; the goods being considered as pledged to the purchaser until the price is restored to him.[3] (Sect. 332.)

WHO CAN SELL AND PURCHASE.

A minor.

A minor or one of unsound mind cannot sell his property, but his guardian may sell for him in case of evident gain, or absolute necessity; the purchaser must acsertain that these facts really exist, otherwise the minor may recover the property, even from one who has purchased in good faith.[4]

A married woman.

Under the Mahomedan Law, a married woman can sell her own property, without the consent of her husband.

1. Muhroninsa Khanum *versus*, M. Budamoon, S. D. A. Rep. Vol. I. p. 158.

2. *Hedaya*, Vol. II. p. 455.

3. *Hedaya*, Vol. II. p. 456.

4. *Hedaya*, Vol. I. p. 115. Princ. Mahomedan Law, p. 306.

It is obligatory upon the purchaser to ascertain these facts, otherwise the heirs may recover, even from one who has made a purchase in good faith.[1]

Sale on death-bed.

A sale made by a person on his death-bed is valid, when the seller at the time was of sound mind, but a sale under such circumstances for an *under value* is under the Mahomedan Law considered as a bequest,[2] and valid only as far as it is within the legal one-third, of which a person may dispose by will. A death-bed sale to an heir is invalid without the consent of the other heirs.[3]

A guardian cannot purchase the property belonging to his ward.[4]

WHAT THINGS CAN BE SOLD.

According to the Mahomedan Law, the subject matter of a sale must be determinate, so as not to admit of future contention, regarding the meaning of the contracting parties; but when the uncertainty is removed prior to the actual arrival of the period stipulated for, the sale becomes again valid.[5] The thing must also be in actual existence at the period of making the contract, so as to be susceptible of delivery, either immediately, or at some future definite period.[6]

Sale void for want of proprietary rights.

The sale of the property of another person without the power for that purpose, is null and void,[7] therefore :—

Master of a ship.

I. The master of a ship cannot sell the ship, nor the goods in the ship, without the special power, or except in cases of a absolute necessity, because he is only appointed to convey the ship and the goods from port to port.

1. See Note No. 4. p. 56
2. *Hedaya*, Vol. IV. p. 503.
3. *Hedaya*, Vol. III. p. 164[1]
4. *Hedaya*, Vol. IV. p. 214.
5. *Hedaya*, Vol. II. p. 450.
6. *Hedaya*, Vol. II. p. 449. Princ. Mahomedan Law, p. 43.
7. *Hedaya*, Vol. II. p. 503.

An heir cannot sell the property he expects to inherit from his parents, or other relatives, because as long as the inheritee is in existence, the heir apparent has no right or interest in such property.[1] (See Sect. 237, 271.)

Mortgaged property.

A property mortgaged and conditionally sold by a *bye-bil-wuffa*, may be sold absolutely to any other person, as long as the conditional sale has not become absolute.[2]

Joint property.

A portion of joint property may be sold without prior division under the Mahomedan,[3] as well as under the Hindoo Law, according to the Bengal School, but not according to the Benares and Mithila School, until a division has taken place, or the assent of the co-sharers has been obtained. (See Sect. 281.) (Sect. 338.)

Things exempted from traffic.

The following things are by nature, or by positive laws, exempted from traffic.

1. All personal rights, such as offices, pensions,[4] sacrificial fees, (Sect. 270,) right of inheritance, (Sect. 337, No. 5) right of pre-emption,[5] and so fourth.

2. According to the Mahomedan Law, the sale of a freeman was null and void.[6]

1. Princ. Mahomedan Law, p. 90. M. Khanum Jha *versus* M. Jhan Bibee S. D. A. Rep. Vol. IV. p. 213.

2. Princ. Mahomedan Law, p. 175.

3. *Hedaya*, Vol. II. 440. Princ. Mahomedan Law, pp. 167, 172.

4. Const. No. 788, 3rd May, 1833, Pensions granted by Government are not liable to attachment in satisfaction of decrees of Court.

5. *Hedaya*, Vol. II. p. 428.

6. *Hedaya*, Vol. II. p. 430.

ON SALES.

Things exempted from traffic under the Mahomedan Law.

The sale by *Mussulmauns* of wine, pork, carrion, blood, silk-worms, and several other things, is forbidden by the Mahomedan Law.[1] (Sect. 339.)

ON THE FORM OF A SALE.

Form of a Sale.

The Law does not prescribe any particular form for a sale. It may either be made verbally, or executed in writing, and however informal, for instance, if not signed by the parties, the contract is valid, when actual tender and acceptance of the parties can be substantially proved.[2] (Sect. 340.)

The creditors of the seller cannot attach, or sell, an article on which an advance has been paid, as such an article is no longer his property.[3]

But may reject the work on inspection.

On delivery of the thing by the seller to the purchaser, the purchaser is entitled to reject it on inspection, because it was bought without inspection.[4] *Aboo Yusuf* however is of opinion, that the purchaser has no such right, as it might be an injury to the seller, since if he rejected the goods, other people might not choose to purchase them for their value; for instance, if a rich man ordered goods of a peculiar and expensive kind, and afterwards rejected them, common people would not purchase such articles for their value.[5] (Sect. 342.)

ON THE OBLIGATIONS OF THE SELLER.

Obligations of the Seller.

It is the duty of the seller distinctly to state, what he is going to sell, and upon what conditions; whenever

1. *Hedaya*, Vol. II. p. 428. & *seq.*
2. Princ. Mahomedan Law, p. 174.
3. *Hedaya*, Vol. II. p. 546.
4. *Hedaya*, Vol. II. p. 540.
5. *Hedaya*, Vol. II. p. 541.

therefore the terms are dubious,[1] they are always to be interpreted against him. His duties consist in the delivery, and the warranty of the thing. (Sect. 391.)

It is lawful under the Mahomedan Law to stipulate for delivery *and* payment at a future time; for instance, that three months hence B. will deliver to A. 100 maunds of rice at 12 annas per maund, and that A., on receipt of the same will pay the price stipulated.[2] A sale of non-extant things is generally invalid, but it is lawful on account of a saying of the prophet,[3] to stipulate for delivery *and instant* payment at a future time of things, not actually extant at the time, when their quantity and quality are distinctly ascertainable and ascertained (called a sillim sale); for instance, if B. sells A. 100 maunds of a certain kind of rice, of the best, middle, or lowest quality, at 12 annas the maund for instant payment to be delivered at a certain place, (Sect. 393), three months hence; but it is not lawful to stipulate for a distant delivery of things in the seller's possession, sold for immediate payment.[4] The reason is that there is no necessity for granting such a postponement, and that a mixture of contracts would thereby be created. (Sect. 394.)

Seller not bound to deliver pay-ment, unless otherwise stipulated.

The seller is not bound to deliver the thing to the purchaser before actual payment,[5] unless time for payment has been granted; therefore, if a thing was sold unconditionally and delivered to the purchaser, and the purchaser

1. Uncertainty invalidates a gift under the Mahomedan Law, (Sect. 274,) but not a sale, if the uncertainty is removed prior to the actual fulfilment of the contract. *Hedaya*, Vol. II. p. 450. Princ. Mahomedan Law, p. 166.

2. *Hedaya*, Vol. II. p. 450.

3. *Hedaya*, Vol. II. p. 516.

4. *Hedaya*, Vol. II. p. 448.

5. *Hedaya*, Vol. II. p. 379; Vol. III. p. 575.

refused to make instant payment, and insisted that the thing was bought upon credit, the purchaser is entitled to take back the thing, as no sale has actually taken place; but if the seller allows the purchaser to remove the thing, so that it is actually out of the possession of the seller, as for instance, if he allows *him* to carry it to his house on condition that immediate payment shall be made there, then a delay of payment, however short, has actually been granted to the purchaser; the sale is complete, and if the purchaser breaks the contract by delaying payment, the seller cannot reclaim his articles, he can merely recover the price. If the seller sends the things with his servant to deliver them in the house of the purchaser on receiving the price, and the purchaser should *there* take possession of the article and refuse payment, the servant, who stands in the place of his master, can *there* take back the article, because it has not yet been legally out of his possession. (Sect. 395.)

The fruits of the thing from that time belong to the purchaser.[1]

In a sale of land, or of a house, all fixtures are included, though they may not have been specified by the seller. Fixtures comprise all such things, as cannot be removed without actually deteriorating the thing. In the sale of "a house," the foundation and superstructure, the windows and doors, are necessarily included, but not loose shades or huts, which may be removed without injuring the house. In a sale "of land," the trees on it are included, because they are connected with the land in the nature of fixtures, and there was no intention of cutting them down, but neither the corn growing on the lands, nor the fruit

1. *Hedaya*, Vol. II. p. 375.

upon the trees, follow the land, as they were intended to be cut down and gathered.[1] The seller must however remove them before delivery.

In a sale of lands, or of a house, the lands or the house, is generally sold with its rights, and appurtenances. *Rights* are such things as are essentially necessary to the use of the subject of the sale, as a road for passing to and from the ground; *appurtenances* are things from which an advantage is derived, but in a subordinate degree, as a well, a drain, a cook-room. As these do not constitute any part of the house, or the ground, but are merely dependent on it, and as the house or the land may be sold without them, they do not follow the sale of the lands or the house, unless generally or specially stipulated for.[2] (Sect. 396.)

Delivery of specific things.

If the thing sold is a specific thing, and the quantity is added as a description of the thing, and it should fall short, the purchaser has the option of annulling the contract, or taking the defective thing at the stipulated price, but he is not entitled to any deduction;[3] for instance, if A. sells a piece of cloth to B. for 10 Rupees, stating it to contain 40 yards in length, and a yard and a half in breadth, and the cloth is found to be deficient, either in length or in breadth, the purchaser can make no deduction, because the contract related to a *piece* of a certain description, and no part of the price is opposed to the length, or the breadth; but had the agreement been for the yard, it would have fallen under the former rule. (See Sect. 397.)

This rule is also applicable to the sale of ground stated to contain so many *beeghas, mehauls, &c.* If the ground in this case be found less, the purchaser may annull the contract,

1. *Hedaya*, Vol. II. pp. 372. 378; Vol. III. p. 147.
2. *Hedaya* Vol. II. p. 502.
3. *Hedaya*, Vol. II. p. 369.

if he will not pay the stipulated price; but he cannot demand a deduction,[1] because he agreed to purchase "the ground," "the estate," "the zemindary" or "the mehaul;" and the quantity mentioned is only a description of it, of its length and breadth; if the ground be found to contain more than was stated, the excess becomes the property of the purchaser without any addition to the price, and the seller has no option. (Sect. 398.)

Expenses necessary for delivery fall on the seller.

As it is the duty of the seller to deliver the thing to the purchaser, all expenses necessary for the delivery must be defrayed by him, unless otherwise contracted. If the things are to be delivered at the purchaser's abode, the charges for conveyance must be borne by the seller, and if they are to be delivered by weight or measure, the charges for weighing or measuring must be paid by him.[2] (Sect. 399.)

WARRANTY.

In what warranty consists.

The warranty which is due by the seller to the purchaser has two objects: 1st, the quiet possession of the thing sold; 2nd, a guarantee against the secret faults or vices of the thing.

Parties can augment or diminish warranty.

The parties can, by special stipulations, augment or diminish the warranty, as well as the effect thereof, and also stipulate that there shall be no warranty at all:[3] in such cases the terms of the contract must be followed; but if the sale has been made without any special stipulation, the seller is bound by the above warranty, (Sect. 398.) and even if non-warranty has been stipulated, the seller is responsible for all personal acts. Thus, if a person guilds a ring and sells it, as a golden ring, on condition that he will not warrant its being gold, still he is bound to refund the price, as it was a fraudulent act. (Sect. 400.)

1. *Hedaya*, Vol. II. p. 368.
2. *Hedaya*, Vol. II. p. 378.
3. *Hedaya*, Vol II. p. 427.

What are considered secret faults or vices.

The responsibility of the seller for secret faults or vices extends to all those faults, which make the thing unfit for the use for which it is designed,[1] or which impairs its use to such a degree that the purchaser, in case he had known its faults, would either not have purchased it at all, or only at a much lower price.[2] The seller is responsible for such faults, even if they were unknown to himself at the time of the sale.[3] (Sect. 401.)

Effect of secret faults.

Whenever secret faults are detected, however long after the date of sale, the purchaser is entitled to return the thing and recover the price;[4] but he is not entitled to retain the article and exact a compensation for the defect, because no part of the price is opposed to the *quality* of the article.[5] Of articles bought by measure or weight the defective part only can be returned, because the price is here opposed to each unity of measure or weight, each of which may be considered a separate article.[6] If it be disputed whether the defect existed before the sale or not, it must, in the absence of sufficient proof, be decided by the oath of the seller.[7] (Sect. 402.)

When the thing cannot be returned, on account of an act of the purchaser.

In case the faulty article has been further deteriorated in the purchaser's possession, *or* the return of the thing has been made impossible by any act of the purchaser, as, by cutting up a piece of cloth, or by mixing the inferior article

1. For instance, if a person purchase a horse described as a carriage horse, and the horse will not draw a carriage. *Hedaya*, Vol. II. p. 408.

2. To ascertian this, it will often be necessary to consult experienced persons. *Hedaya*, Vol. II. p. 409.

3. *Hedaya*, Vol. II. p. 406.

4. *Hedaya*, Vol. II. p. 406.

5. *Hedaya*, Vol. II. p. 406.

6. *Hedaya*, Vol. II. p. 422.

7. *Hedaya*, Vol. II. p. 418.

with other articles, the purchaser is entitled to compensation corresponding with his loss, which in doubtful and disputed cases must be fixed by experienced arbitrators. (Sect. 404.)

When warranty of faults ceases.

The right of the purchaser to recover the price or damages for secret faults, ceases: 1st, when he makes use of the article after being aware of the fault, because this involves a tacit consent to keep the thing as it is; 2ndly, when he attempts to remove the defect, as for instance, by applying medicines to a sick horse, since this also involves consent;[1] 3rdly, when he sells the thing to another person for he cannot then return the article; but if in this case the defective thing is returned to him on account of the fault, his right revives.[2] (Sect. 406.)

ON THE ANNULMENT OF A SALE.

Right of pre-emption under the Mahomedan Law refers only to real property.

The right of pre-emption under the Mahomedan Law refers only to real property, lands or houses,[3] and belongs, I. to a sharer in the property of the ground, or lands sold, II. to a partner in the rights and appurtenances of the land, or house; such as the right to water and to private roads; III. to a neighbour.

A sharer in the property has preference over one, who is only a sharer in the rights and appurtenances of the lands; and he again over one who is only a neighbour; several individuals in the same class have equal rights; each individual takes one share, without regard to the extent of their several properties. If some of the sharers happened to be absent, the right of pre-emption belongs to those who are present, because it is uncertain whether those who are

Hedaya, Vol. II. p. 410. Princ. Mahomedan Law, p. 45.

1. *Hedaya*, Vol. II. p. 423.
2. *Hedaya*, Vol. II. p. 416.
3. *Hedaya*, Vol. III. p. 591.

absent are inclined to make use of their right; but when the absent sharers afterwards appear and claim their share, they are entitled to it.[1] (Sect. 413.)

The right begins first after the sale;—duties of seller and claimant.

The right of pre-emption commences after the sale, or rather, when the proprietor has declared his willingness to part with the property.[2] It is then the duty of the seller to inform the sharers, or the neighbours. If he does not inform them, they are entitled to make use of their right, as soon as it becomes known to them, that the property is sold.[3] It is the duty of the person claiming the right, to declare his intention the moment he is informed of the transaction, and to give his declaration in the presence of witnesses. If he makes any delay in declaring his intention, he loses his right, partly because the right is of a feeble nature, and partly because there is no necessity for consideration, as he ought to be well acquainted with the value of the property, and his ability to purchase it.[4] (Sect. 414.)

Claimant must take the property upon the same terms as the purchaser.

When the claimant has declared his intention to take the property, he is to take it upon the same terms, as the person who is willing to purchase it, or actually has purchased it. If the price or the conditions should be disputed, for instance, if it should be alleged, that the price has fraudulently been stated higher than that, which had actually been agreed upon, the purchaser's statement upon oath is to

1. *Hedaya*, Vol. III. pp. 562 to 567. Princ. Mahomedan Law, p. 192.

2. A refusal to make use of the right previous to the actual sale of the property has no effect, as the cause of pre-emption, *viz.*, objections to the particular purchaser, does not then exist. Sakina Khanum *versus* Gour Sunkur Shen. S. D. A. Rep. Vol. V. p. 299.

3. Omed Raj *versus* Nakched Raj. S. D. A. Rep. Vol. V. p. 68.

4. *Hedaya*, Vol. III. pp. 568, 569.

be believed. When the property was sold for a price payable at a distant period, the claimant may either wait, until that period is expired, and then take the property for the same price; or, he may take it immediately on paying the price; but he cannot claim any respite for payment, which had not been given to the purchaser.[1]

Claimant must bring his complaint into the Court within a month.

Should the seller, or the purchaser, object to the claimant's right, the claim must be preferred in the Court *within a month*,[2] because if the claimant could delay the litigation as long as he pleased, it would be very vexatious to the purchaser, who would be prevented for an indifinite time, from enjoying the property under the apprehension of being deprived of it by the claim of this right of pre-emption; and the delay on the part of the claimant is a presumptive proof of his disinclination to use his right.

But is not required to deposit the price in the Court.

The claimant is not obliged to deposit the price into the Court on preferring his claim. It is sufficient that he pays it, when his right has been acknowledged,[3] or when the Court may think proper;[4] but if he does not pay it at that time, the right is forfeited. Even when he has obtained a decree in his favour, he cannot demand the delivery of the property until actual payment.[5] (Sect. 415.)

When the property has been improved or deteriorated.

Whenever the immediate purchaser has made any improvements in the property, the claimant by right of pre-

1. *Hedaya*, Vol. III. pp. 577. 583.

2. *Hedaya*, Vol. III. p. 572. Princ. Mahomedan Law, p. 48, note, 184. S. D. A. Rep. Vol. V. p. 69. Zaffir and Mahomed Contend, on the reasons stated, that the claim must be preferred within a month; but Aboo Huneefa is of opinion that the claim may be preferred at any subsequent time.

3. *Hedaya*, Vol. III. p. 575.

4. Golam Nubby Chowdhry *versus* Gour Kissor Raj. S. D. A. Rep, Vol. I. p. 350.

5. *Hedaya*, Vol. III. p. 575.

emption must either pay their value, or cause the augmentations to be removed. In case the property has been deteriorated by the purchaser, the claimant is entitled to a proportional deduction in the price; but when the deterioration has not been caused by the purchaser, the claimant must either pay the whole price, or resign his claim.[1] (Sect. 416.)

When the right of pre-emption ceases

The right of pre-emption ceases when the party entitled relinquishes his right, expressly, or tacitly, by neglecting to demand it, or to prosecute the claim in due time. A father, or a guardian, may renounce the right on behalf of an infant ward.[2] The right is not extinguished, when the claimant has relinquished it upon misinformation of the price, or of the purchaser, (as he may not wish to have *one* person for his neighbour, though he may have no objection to another) or of the thing which was to be sold, as for instance, if he had been informed, that one half was to be sold, and it afterwards appeared that the whole was sold. According to *Zahir Rawayat*, if the case be reversed, that is to say, if he first learns that the whole was to be sold, and afterwards, that only the half is sold, his right is extinguished, because his resignation of the whole, comprehends his resignation of a part.[3]

1. *Hedaya*, Vol. III. p. 586. Princ. Mahomedan Law p. 48.

2. Mahomed and Zaffir contend, that the father or guardian cannot lawfully resign this right, and that the minor is entitled to claim it, as soon as he attains maturity, because it is a personal right, firmly established in the infant, to which their authority does not extend; and their authority is vested in them in order that they may prevent any injury to the minor, but by relinquishing his right, they would cause an injury, instead of preventing one. *Aboo Huneefa* and *Aboo Yoosef* however are of opinion that the father and the guardian, may legally resign the right, expressly, as well as tacitly, on the grounds, that the right is virtually a purchase, and may either be productive of loss, or of gain, and that the relinquishment may therefore really be for the benefit of the minor. *Hedaya*, Vol. III. p. 608.

3. *Hedaya*, Vol. III. p. 603.

The right cannot be renounced for a compensation.

The party entitled to pre-emption cannot renounce his right for a compensation, because it is a mere personal right, and not a subject of exchange. If he stipulates for compensation, he forfeits his right, and is not entitled to the compensation.[1] For the same reason the right becomes extinct, when the claimant dies before obtaining a decree; but if he dies after having obtained a decree without having paid the price, or obtained possession of the property, his right devolves upon his heirs. Who become responsible for the price.[2] (Sect. 417.)

The right exists only when the property is transfered for a considertion.

The right of pre-emption exists in every case, where the property is transfered for a consideration, but otherwise not. It does not exist where the property is transfered in lieu of dower, or for granting a divorce, or on a partition among partners, or as a gift.[3]

And may be evaded by devises.

The right is a weak one, and may easily and legally[4] be evaded by some devise or other. The proprietor may, for instance, first sell a part of the property, when if the person entitled to pre-emption declines to purchase such part, the purchaser of it becomes as a sharer, entitled to a preference in the purchase of the other part; or, if the person entitled to pre-emption is a neighbour, the proprietor may first sell that part of the property, to which there is no neighbour, reserving to himself a small part towards the

1. *Hedaya*, Vol. III. p. 599.

2. *Hedaya*, Vol. III. p. 600.

3. *Hedaya*, Vol. III. pp. 592 & 594. Princ, Mahomedan Law, p. 47.

4. Mahomed considers such devises invalid as they are only intended to elude, and set at nought the previlege, by which the end of the Law in granting the previlege would be defeated; but *Aboo Yoosef* contends that such devises are valid, because they prevent the right from ever being established, and the inconvenience that may accrue to the person entitled to the right, ought not to be regarded. *Hedaya*, Vol. III. p. 606.

neighbour's side, and afterwards sell the rest to the first purchaser ; or, he may sell the property on the condition, that he shall have the power of annulling the sale afterwards, and his proprietory right would not be extinguished—and no right of pre-emption consequently exist—till he relinquished that power.[1] (Sect. 418.)

The right of pre-emption is an equitable right & should generally be upheld.

The right of pre-emption, and the rules connected with it under the Mahomedan Law, are just and equitable. The principle on which the right is established, *viz.* the prevention of disagreement arising from having a bad neighbour, or from partnership, is generally applicable, and even more so, among Hindoos, on account of their division of cast, than among Mussulmans. The right belongs under the Mahomedan Law, to every person without distinction of sex, age, or creed ;[2] and having thus for centuries been recognized by the law of the land (Sect. 9) as a common right belonging to all persons without regard to the religion they profess, it ought still to be regarded as such (See Sect. 10.) (Sect. 419.)

ON THE EFFECT OF THE ANNULMENT OF A SALE.

The Mahomedan Law distinguishes between a null, an invalid, and an improper (also called an abominable) sale. A sale is null, where its subject is not of an appreciable nature, for instance, a sale of a freeman, of a bird in the air, &c. ; it is invalid, where it is lawful with respect to its essence, but not with respect to its quality, for instance, a sale on conditions which could not legally be stipulated for in the same contract (Sect. 332,) or a sale contrary to another person's right of pre-emption (Sect. 413.) but the terms null and invalid are used indis-

The Mahomedan Law distinguishes between a null, an invalid, and an improper sale.

1. *Hedaya*, Vol. III. p. 604.
2. *Hedaya*, Vol. III. p. 592.

criminately. A sale of the property of another without his consent, and a sale by a minor, or a married woman of property not her own, is null. An improper sale is such as is lawful both in its essence and quality, but attended with some circumstances of impropriety, or abomination, as for instance, a sale on a Friday, a sale of blood and carrion, &c.[1]

When a sale is null, no sale is considered to have been effected, the parties have no rights under the sale. The subject matter of the sale in the hands of the purchaser, and the price in the hands of the seller, is considered as a trust. If the thing, or the price, perish by accident, it is lost to the owner; but if it perish, or become deteriorated, by any act of the possessor, he is responsible. The fruits of the thing, or of the price, belong to the actual owner, not to the possessor.[2]

When a sale is invalid, the purchaser becomes proprietor of the article, upon taking possession of it, and is responsible for its *value*, not for its *price*, if it be deteriorated, or lost in his hands. During possession, the fruits of the property, and the use of the price accrue to each party on the strength of the contract.[3] If the purchaser under an invalid sale sells the article, the second sale is valid; the purchaser's right of annulling the sale expires, and the seller can only recover the *value* of the thing from the first purchaser.[4] The seller under an invalid sale is entitled to resume the goods from the purchaser, but not till he restore the purchase money; if the property is changed, altered or improved by the purchaser, the seller cannot resume the thing; he can only recover the *value* of it, as

1. *Hedaya*, Vol. II. p. 428.
2. *Hedaya*, Vol. II. p. 429.
3. *Hedaya*, Vol. II. p. 454.
4. *Hedaya*, Vol. II. p. 455.

the purchaser acted in virtue of a power from the seller, on an idea of perpetual possession.[1]

When the sale is improper or abominable, it is null;[2] but when it is abominable only on account of some extraneous point, for instance, a sale on a Friday, it is legally valid, though improper.[3] (Sect. 420.)

The law makes no distinction with regard to the fruits of the thing (the mesne profits) between a purchase made in good faith, or in bad faith.[4] (Sect. 421.)

The fruits (mesne profits) are always to be restored to the real owner.

It is otherwise with regard to deterioration and augmentations to the property, during the possession of the purchaser, because these are caused by *separate* acts of the purchaser, and are therefore determinable with reference to the cause and intention which occasioned them. If the purchaser acted in good faith, he is not responsible for deterioration, but is entitled to compensation for augmentations from the person, who occasioned the illegal act; and if the purchaser acted in bad faith, he is responsible for the deterioration caused by his own acts, and by the acts of others, and is not entitled to any compensation for augmentations.[5] (Sect. 422.)

But the effect of deterioration, or of augmentations to the property depends on the cause and intention of the act.

OBLIGATIONS OF THE PURCHASER TOWARDS THE REAL PROPRIETOR.

When the sale was, what is, strictly speaking, termed invalid, and not what is termed null and void, the seller can recover the property from the purchaser, only on restoring the price. He can neither recover the fruits

In an invalid sale he can recover only from the immediate purchaser on repaying the price.

1. *Hedaya*, Vol. II. p. 457.
2. *Hedaya*, Vol. II. p. 428.
3. *Hedaya*, Vol. II. p. 461.
4. *Hedaya*, Vol. II. pp. 508 & 514.
5. *Hedaya*, Vol III. pp. 526 & 533,

from him, nor the thing itself, or its fruits from a succeeding purchaser. (See Sect. 420.) (Sect. 424.)

When the property has been deteriorated or augmented.

In case the property has been deteriorated or augmented, during the time the purchaser held poseession, for instance, by planting trees, building houses, &c., on the ground, the real proprietor is still entitled to recover the property. If the purchaser held possession in good faith, damages for deterioration cannot be recovered from him; but he is responsible, if he held possession in bad faith. The purchaser is always entitled to remove additions or augmentations to the property, whether he possessed it in good, or in bad faith, so as to restore the property to its original state, because the proprietor had only possession of it in its original state.[1] When however the removal might be injurious to the land, the proprietor has the option of paying a compensation for the trees, or the buildings, equal to their value, *when removed* from the ground, because this is an advantage to both, and an injury to none, the proprietor is not bound to take the additions and give compensation, as this might be an injury to him, either because the additions may be useless to him, or he may not have the means of paying for them. (Sect. 425.)

Aboo Huneefah is of opinion that the real proprietor may recover the thing in its altered state, and that the fraudulent possessor is entitled to no compensation for his workmanship; but his disciples contend, that whenever a valuable opperation has taken place, the proprietor must be contended with full compensation by means of course of the altered thing, if necessary; because the restoration of the thing to its original state has become impossible, and the proprietor suffers no injury, when he obtains compensa-

1. *Hedaya*, Vol. III. p. 539.

tion; but if the purchaser were to lose his workmanship, he would sustain a positive loss.[1]

When a beam or other materials is built into a house, so that it might be restored, but not without great detriment to the other party, it is for the same reasons held, that the right of the proprietor is converted into a right to full compensation.[2] (Sect. 426.)

Or only to the great detriment of the other party.

ON MORTGAGE AND PAWN.

ON THE REQUISITES TO A MORTGAGE AND PAWN.

Under the Mahomedan Law, a mortgage or pawn is in its very nature considered to be a contract that requires the pledge to be actually delivered to the mortgagee, or pawnee, or to some other person on his behalf; for, the end of the contract cannot be obtained without delivery, *viz.* the mortgagee may detain the thing in his possession as security for the fulfilment of the principal engagement, and, in case of non-fulfilment, obtain payment by the realization of the pledge in preference over all other creditors of the mortgager. Actual delivery is therefore considered equally necessary in a mortgage, as in a pawn.[3] An agreement to the effect that the debtor will give security, cannot be enforced, as the giving of a pledge is considered a *voluntary* Act of the debtor. When the stipulator does not obtain the security that has been promised, he can merely annul the contract on account of non-fulfilment of the condition, and enforce instant payment of whatever may be due to him.[4] (Sect. 433.)

The consent of the parties may either be given by express words or by implication; for instance, when a per-

Consent either express or implied.

1. *Hedaya*, Vol. III. p. 536.
2. *Hedaya*, Vol. III. p. 537.
3. *Hedaya*, Vol. IV. p. 189. Princ. Mahomedan Law, p. 74.
4. *Hedaya*, Vol. IV. p. 221.

son purchases goods, and gives the seller some other things to keep until such time, as he pays him the purchase money;[1] or when he gives materials to a workman for performing some work on it; in which case the workman is entitled to detain the materials, as if they had been pawned to him, until he is paid for his work.[2] (Sect. 434.)

Mortgage or pawn is either common, or usufructuary.

A mortgage, or pawn, is either common, when only the detention of the thing is stipulated, or usufructuary, when it is stipulated that the mortgagee, or pawnee, shall have the use or the usufruct of the thing during time, it is detained in his possession.[3] (Sect. 435.)

A guardian may legally pledge the property of his ward, even to himself, for necessaries furnished to the ward. A father may pledge the property of his son, even for his own debt; because he has an unlimited power over the property belonging to his son. (See Sect. 287.) The son can recover the pledge only by redeeming it, but he may afterwards prefer a claim against his father for the debt which has been paid by means of his property.[4] (Sect. 436.)

WHAT THINGS ARE CAPABLE OF BEING MORTGAGED OR PAWNED?

What things are capable of being mortgaged or pawned.

Every thing which is capable of being detained in the possession of another, and which is not by its nature, or by law, exempted from traffic. (See Sect. 339.) Can be mortgaged or pawned.

An indefinite part of an article, or a share of joint undivided moveable property, cannot be pawned, as seisin is impossible; an article naturally conjoined to another, can-

1. *Hedaya*, Vol. IV. p. 222.
2. *Hedaya*, Vol. III. p. 320.
3. *Hedaya*, Vol. IV. p. 215.
4. *Hedaya*, Vol. IV. p. 215.

not be pawned separately; thus fruit on the tree, cannot be pledged without the tree; or the crop, without the ground on which it grows, &c.[1]

Salary, or wages, cannot be pledged, as seisin cannot take place before the salary falls due. If the master however gives his consent to a contract of this nature, he is considered as holding the wages as a trustee for the creditor, and becomes responsible to him for the amount of the wages, during the time the debtor remains his servant.[2] He is not of course bound to keep the servant in his service, until the debt be paid, but is merely responsible to the creditor in case he should pay the wages to the servant, or to any other, during the time the servant remains in his service. (Sect. 437.)

FORM OF A MORTGAGE, OR PAWN.

A pawn may be executed by the parties agreeing to place the pledge in the hands of a third party, who then becomes the trustee for them both. If the trustee delivers the pledge to the pawner, he becomes responsible to the pawnee for the debt; and if he delivers it to the pawnee, he becomes responsible to the pawner for its value. In case the pledge is lost or damaged while in possession of the trustee, the pawnee is responsible, because the trustee took possession for him, and on his responsibility.[3] (Sect. 438.)

The pledge may be given into the hands of a third party.

ON USUFRUCTUARY MORTGAGE, OR PAWN.

Under the Mahomedan Law, it is not lawful for the mortgagee, or pawnee, in any shape to enjoy the use of the pledge, as all interest is considered usuary.[4] (Sect. 439.)

1. *Hedaya*, Vol. IV. p. 204.
2. *Hedaya*, Vol. IV. pp. 232.
3. *Hedaya*, Vol. IV. p. 232.
4. *Hedaya*, Vol. IV. p. 199.

ON CONDITIONAL MORTGAGES, OTHERWISE CALLED BYE-BIL-WUFFA OR KUT-CUBALAH.

On mortgage and conditional sale.

A mortgage for the security of money, lent on the condition, that if the money is not repaid within a certain time, (with or without interest) the property mortgaged shall become the property of the mortgagee for the sum lent, is generally termed a Bye-bil-wuffa, or Kut-cubalah.

Under the Mahomedan Law, it is questionable, whether this species of contract as regards conditional sales, is valid,[1] but it is unquestionably valid under the Regulations. (Sect. 442.)

With or thout possession of the operty mortgaged.

In this species of mortgage, the possession of the property mortgaged is either transferred to the mortgagee, or continues in the possession of the mortgager. (Sect. 443.)

On mortgage by law; creditors have generally an equal right to obtain payment.

All creditors have, according to natural law, an equal right to demand and enforce payment from their debtors.[2] (Sect. 450.)

ON THE RIGHTS AND OBLIGATIONS OF THE MORTGAGEE, OR PAWNEE.

When two articles have been pledged to one person.

When two or more articles have been pledged for one debt, the pawnee is entitled to detain all the articles until the whole debt be paid, because none of the articles were opposed to any specific part of the debt; but, if several articles belonging to one person, have been pledged by different agreements, they may be separately redeemed, and the pawnee is not entitled to detain any one article for his other claims.[3]

When one article has been pledged to several individuals.

When one article has been pledged to two or more persons, for instance, to a joint family, the article is held

1. S. D. A. Rep. Vol. I. p. 57, Note.
2. *Hedaya*, Vol. III. pp. 361, 484.
3. *Hedaya*, Vol. IV. p. 223.

to be completely pledged to each of the creditors; because the spirit of the agreement is, that the article is held entire and in one pledge. If the mortgagees agree among themselves to alternate possession, each of them is a trustee on behalf of the other, during the term of possession; and, if the pledge be destroyed or damaged, each is responsible according to his respective share. In case the mortgager pays off the debt of either, the article remains *wholly* in pledge with the other, since it was before completely so in the hands of each without a seperation.[1] (Sect. 451.)

When two persons have pledged an article to one individual.

When two or more persons mortgage or pawn a property to one person for a joint debt by one agreement, the pledge is detained in security for the whole debt, and the mortgagee or pawnee, is entitled to detain the whole pledge, until the whole debt be paid; because they pawned the thing together, and he obtained a complete, and undivided possession of it. If one of the mortgagers is desirous of redeeming it, he may offer the other partner the option of redeeming it at the same time; and if the co-partner be unable or unwilling to do so, he may redeem the whole, and he then becomes a claimant upon his co-partner for what has been paid on his account.[2] (Sect. 451.)

Bound to take care of the thing.

During possession, the mortgagee is bound to pay such attention to the care of the thing, as persons of ordinary discretion, and prudence give to their own affairs. If he transfers the care of its preservation to any other person,

1. *Hedaya*, Vol. IV. p. 224.

2. *Hedaya*, Vol. IV. p. 225. Arman Pande *versus* Nourutton Koonwur. S. D. A. Rep. Vo'. III. p. 78. Muckun Lal *versus* Wuzeer Allee. *Ibid*, Vol. IV. p. 32. In the last case, the heir to one-half of a mortgaged property was allowed to redeem his half share; but the other partner had in this case previously sold the whole property illegally.

than the members of his own family, he becomes responsible for the person to whom he gave it in charge.[1]

Expenses for keep and conservation of the pledge by whom to be defrayed.

The expenses requisite for the consideration of the pledge rest therefore upon the mortgagee or pawnee; as, for instance, the rent of the house in which the thing is kept, the wages of Chowkeedars for watching it, &c.; but expenses that are requisite for the support of the pledge, and the continuance of its existance lie upon the mortgager, or pawner; as, for instance, the cost of keeping and feeding a horse, or a cow; because though the pawnee is entitled to the possession of the pledge, the pawner is still its owner.[2]

Extraordinary expenses, which are equally as necessary for the conservation of the pledge, as for its existence, for instance, expenses incurred by the sickness, or the like, of the pledge, must be defrayed by both in proportion to the amount of the debt, and the excess of the value of the pledge over the debt.[3] (Sect. 452.)

Not entitled to use the pledge unless specially stipulated for.

The mortgagee or pawnee is not allowed to use the pledge, except this has been specially stipulated for, or is necessary for its preservation; thus, a cow must be milked. He cannot let it out, or give it in loan, because as he has no right to use it himself, he cannot have any right to transfer the use to any other.[4]

Effect of transgressions of the contract by use, &c.

Should the mortgagee use a pledge which was given to be kept only, or commit any other transgression with respect to the pledge, he forfeits the interest of his claim

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1. *Hedaya*, Vol. IV. p. 199.
2. *Hedaya*, Vol. IV. p. 200. Princ. Mahomedan Law, p. 74.
3. *Hedaya*, Vol. IV. p. 202.
4. *Hedaya*, Vol. IV. p. 199. Princ. Mahomedan Law, p. 75.

and must make reparation for all actual loss, because he has broken the terms of the agreement.[1] (Sect. 453.)

Bound to give damage for the loss or the deterioration of the pledge.

If the pledge be lost or damaged in the hands of the pawnee by his neglect, or by any wilful act, he is responsible for the full value of the pledge,[2] but if it be lost by accident, or by the act of a third party, the pawnee looses the amount of his debt and the pawner his pledge. Should the value of the pledge, however, be less than the debt, the pawnee forfeits that part of his claim only, which is equal to the value of the pledge.[3]

When the pledge has been damaged, the pawner may, according to the opinion of Abu Huneefah and Abu Yoosuf, either redeem the pledge by paying the whole of the debt, relinquish it, and compound with the pawner for its value. But according to the opinion of Mahommed, he may either redeem the pledge by paying the whole debt, or, he may give it to the pawnee in payment of the debt ; because as it cannot be redeemed without a compensation, it is, according to his opinion, the same, as if the pledge had been actually lost.[4]

When the pledge is destroyed or damaged by a third party, the pawnee is responsible to the pawner, and the third party to the pawnee ; because, though the pawner

1. As it is prohibited, under the Mahomedan Law, to take interest, the only effect of transgressing the terms of the contract, under that Law is, that he shall make full reparation. *Hedaya*, Vol. IV. p. 199. At present, however, a Mussulman can as legally stipulate for legal interest as a Hindoo. (Syad Khadim Allee *versus* Duljeet Sing, S. D. A. Rep. Vol. II. p. 255) the effect of transgression with respect to the pledge, must therefore now be determined by the rules of the Hindoo Law, both for Mussulmans and for Hindoos.

2. *Hedaya*, Vol. IV. p. 193. Princ. Mahomedan Law, p. 75.

3. *Hedaya*, Vol. IV. pp. 193, 243. Princ. Mahomedan Law, p. 75,

4. *Hedaya*, Vol. IV. p. 219.

is the owner, yet the pawnee is entitled to the detention of the pledge, and is therefore also entitled to its substitute, the value.[1]

Should the pledge merely become depreciated in value, during the time it was in the pawnee's possession, the pawner must still pay his whole debt;[2] but if it was stipulated, that in case the pledge was not redeemed within a certain time, it should become the property of the pawnee for the debt, the pawner is of course entitled to refuse redeeming it, See Const. No. 898, 5th September, 1834. (Sect. 454.)

Entitled to transfer his rights.

The mortgagee or pawnee may transfer his rights to another person; in other words, he may pledge the thing pledge to him with another person, upon the same terms on which it was pledged to him.[3] He becomes in this case security for the new mortgagee, so that if the thing should be lost or deteriorated in his hands, he will be responsible for the loss to the mortgager, or pawner.[4] (Sect. 455.)

The mortgagee, or pawnee, is not however authorised to sell the pledge himself, except this has been especially agreed to.[5] Like any other creditor, he must sue for payment of his debt, and is even then entitled to cause the pawner to be imprisoned, as for another demand, though a pledge has been given; because this is the legal remedy to prevent the pawner's postponing payment by delaying the sale of the pledge.[6] (Sect. 456.)

1. *Hedaya*, Vol. IV. p. 243.
2. *Hedaya*, Vol. IV. p. 244.
3. *Hedaya*, Vol. IV. p. 199.
4. *Hedaya*, Vol. IV. p. 199.
5. *Hedaya*, Vol. IV. pp. 199, 231. Princ. Mahomedan Law, p. 74.
6. *Hedaya*, Vol. II. p. 624, Vol. IV. p. 194.

Not entitled to use the pledge, or to get it returned for selling it.

He is not entitled to make any use of the pledge during the time it remains in the possession of the pawnee, unless this has been specially stipulated for; for instance, he is not entitled to milk a cow, which has been pledged, or the like;[1] neither is he entitled to demand the restoration of the pledge, with a view of selling it, and thereby pay off his debt, as it follows from the nature of the contract, that the pawnee is entitled to detain the pledge until he is paid.[2] (Sect. 458.)

Bound to pay expenses for preserving the pledge.

He is bound to pay all regular expenses, which have been incurred by the pawnee to preserve the existence of the pledge; as, expenses for the keep and feeding of a horse pledged, and the like. Extraordinary expenses, equally necessary for the preservation of the pledge with the pawnee, and for its existence, such as, expenses incurred by the sickness, or the like of the pledge, must be defrayed by both parties in proportion to the amount of debt, and the excess of the value of the pledge over the debt. See Sect. 452 (Sect. 459.)

Entitled to damages on the loss of the pledge.

He is entitled to recover damages from the mortgagee, or pawnee, to the full amount of his loss, when the pledge has been lost or deteriorated in the possession of the mortgagee, or pawnee, by any wilful act, or by the neglect of the mortgagee, or pawnee. If the pledge has been lost in his hands by accident, or by the act of a third party, the mortgager becomes released from the whole debt, in case the value of the pledge exceeded the amount of the debt,

1. *Hedaya*, Vol. IV. p. 192.
2. *Hedaya*, Vol. IV. p. 198.

or, if the value was less, for a part of it in proportion to the value of the pledge. See Sect. 454.

Or the use of it.

When the mortgagee, or pawnee, has used the pledge without the consent of the pawner, he is not bound to pay any interest on his debt. See Sect. 453. (Sect. 460.)

Not entitled to sell the pledge without the consent of the other party.

He is not entitled to sell the thing without the consent of the mortgagee, or pawnee; if he sells it without his consent, the sale does not become invalid, but remains suspended. If the debt be due at the time, the purchaser must pay the debt and redeem the property, and the sale then becomes effective; if the debt is not due at the time, and the mortgagee or pawnee does not consent to receive payment, or to accept the purchaser as his debtor, the sale becomes suspended until the debt is due, and the property can be redeemed. If the pawnee consent to accept the purchaser as his debtor in lieu of the original mortgager, the sale becomes effective; the original pawner is released from all obligation, and the purchaser becomes the pawner, to all intents and purposes, under the terms of the original contract.[1] (Sect. 461.)

ON THE EFFECT OF A MORTGAGE OR PAWN.

Moveable property once pawned cannot be legally pawned a second time, as possession cannot be given to the subsequent pawnee, and no pawn can consequently be established. (See Sect. 432.) But if a second pawn be effected by some fraudulent act of the pawner; for instance, if he took away the thing from the pawnee, and then pawned it with some other person; the second pawn would be invalid through the fraud of the pawner. The same would be the effect if the pawner obtained the thing from

1. *Hedaya*, Vol. IV. pp. 231, 237. Princ. Mahomedan Law, p. 175.

the pawnee as a loan, for temporary use; as the pawner, in this case, obtained possession of the thing, not as owner, but as lender.[1]

ON EXECUTORS, ADMINISTRATORS AND CURATORS OF ESTATES.

According to the Mahomedan Law,[2] and English Law[3] every person—male or female—who can make a will, (Sects. 294—6) can appoint one or more executors for the administration of his whole estate,[4] and this power is extended to every person subject to the jurisdiction of the Civil Court, whether he be Hindoo, Mussulman or Christian, by Reg. 5, 1799, Sect. 2. Consult Reg. 19, 1841, Sect. 15. (Sect. 55.)

Who can be appointed executor.

Every person equal to the discharge of his duties can be an executor.[5] An infant may be appointed, but as he cannot act before he comes of age, an administrator will be substituted until that time. A married woman may also be an executrix. Under the Mahomedan Law, the husband's consent is not requisite, nor does he act for her.[6] (Sect. 56.)

An appointed executor may take charge of the state.

Whenever the deceased has appointed one or more executors capable of acting, such person is entitled[7] to

1. *Hedaya*, Vol. IV. p. 246.
2. *Hedaya*, Vol. IV. p. 544 *Sirajiyyah*.
3. Blackstone's Com. p. 503.
4. Baillie, 5.
5. According to Mahomedan Law, if a person of another religion was appointed executor, the will was not invalidated, but it was incumbent on the Civil Court to appoint another. *Hedaya*, Vol. IV. p. 541; but this has been abolished; a Hindoo or a Christian may legally be the executor of a Mahomedan, and *vice versa*. S. D. A. Rep. Vol. IV. pp. 55, 303.
6. *Hedaya*, Vol. IV. p. 542.
7. He is not of course obliged to act, unless he should have given promise to that effect to the testator. *Hedaya*, Vol. IV. p. 539.

take charge of the Estate without any application to the Court,[1] and to manage it in preference to any relative or heir,[2] except the heir is a disqualified landholder, when the Court of Wards may appoint a manager of the Estate during the period of disqualification, if the Court thinks it necessary or expedient.[3] (Sect. 57.)

Exception.

If two executors are appointed separately.

If two or more executors have been appointed separately, one of them may act without the concurrence of the other, and he becomes then solely responsible ; but if all the appointed executors are inclined to act, or if they have been appointed jointly, one of them cannot lawfully act without the concurrence of the other, unless 1st, the act requires immediate execution, as, disbursing funeral charges, paying for the maintenance of the children of the testator, &c., or 2ndly, is of an incumbent nature, as, returning a diposit which is no exercise of power but the performance of a duty, or 3rdly, does not require any deliberation, as, emancipating a slave, paying a legacy according to the directions of the testator; or 4thly, is evidently for the benefit of the Estate, as receiving a gift.[4] whether executors are appointed separately or jointly must depend upon the expressions of the appointment ; if it is not clear that they are to act jointly, it seems proper to consider the appointment as separate ; because that they are to act jointly is a restriction, which must be proved. (Sect. 58.)

Or jointly.

1. Reg. 5, 1799 Sect. 2. The appointed executor becomes virtually so by acting in conformity with the appointment, see *Hedaya*, Vol. IV. p. 540 ; S. D. A. Rep. Vol. V. p. 198.

2. *Hedaya*, Vol. IV. pp. 542, 554. S. D. A. Rep. Vol. III. p. 49.

3. Reg. 10, 1793, Sect. I. Reg. 7, 1799, Sect. 26. Reg. 6, 1822, Sect. 4.

4. *Hedaya*, Vol. IV. p. 544. Either of them is said to be empowered to institute a suit, because it is impossible that both can plead at once ; but this argument holds good only with respect to verbal pleading ; written proceedings must be made jointly, as it is an act which requires deliberation.

If one of two executors dies.

Upon the death of one of two separate executors, the right to act is in the survivor ; but upon the death of one of two joint executors the survivor is not entitled to act alone, because if the testator had been content with the discretion of one person in the management of his affairs, he would not have committed it to two.[1] If the deceased proprietor has left any direction for this case, this direction is to be followed ; but if not, the direction of the deceased executor will be in force. If no directions exist, the Civil Court is to appoint a person in the room of the deceased executor.

Executor of executors.

When a sole executor does having appointed an executor to his own will, the person so appointed becomes also the executor of the original testator.[2] (Sect. 59.)

Legacy to be paid to whom.

A legacy should generally be paid to the legatee or his agent, and to no other. A legacy to a minor should be paid to his legal guardian,[3] but the executors of father, grandfather, mother, brother or paternal uncle, become, under the Mahomedan Law, the guardians of the minor children or absent heir for such legacy.[4] The executor himself is not empowered to distribute the estate among the heirs and keep the legacy for the minor, as he is not appointed on behalf of the legatees, but on behalf of the *heirs* ; the legacy should therefore either remain unpaid, so that the legatee continues to have his claim upon the estate or the heirs ; or it should be deposited in the Court. In case the executor should keep the legacy in his hands, the heirs will still be responsible, if the legacy should perish, as the legacy was a debt on the estate.[5]

Legacy to a minor. Under the Mahomedan Law.

1. *Hedaya*, Vol. IV. p. 544. Baillie, 11.
2. Baillie, 11. 2 Blackstone's Com. 506.
3. *Hedaya*, Vol. IV. p. 552.
4. *Hedaya*, Vol. IV. pp. 542. 554. Baillie, 5, 8.
5. *Hedaya*, Vol. IV. p. 549.

To an absent legatee.

The above rules are also applicable to an absent legatee. Under the Mahomedan Law the executor is not empowered to keep the legacy for him, but is either to let it remain unpaid as a claim upon the heirs, or deposit in the Court,[1] but as he is appointed on behalf of the heirs, he is entitled to keep the share of an absent heir in his own hands.[2] (Sect. 66.)

To a married woman.

A legacy to a married woman should, under the Mahomedan Law, be paid to the woman herself, as she is absolute owner of her own wealth.[3] (Sect. 67.)

Executor may sell moveable and immoveable property.

An executor is empowered to sell property belonging to the estate, moveable as well as immoveable ; and whether necessary for the payment of debts and legacies or not, the sale is still valid, but the executor is of course responsible, if the property has been sold without any good reason and to the detriment of those concerned.[4] (Sect. 68.)

If the executors are proved to be unfit or to have been guilty of any misbehaviour, they are either removed or another person is appointed to act jointly with them.[5] (Sect. 70.)

1. *Hedaya*, Vol. IV. p. 549. Princ. Mahomedan Law, 53.

2. *Hedaya*, Vol. IV. p. 548.

3. Princ. Mahomedan Law, 154, 254. Choitun Chowdry *versus* Beer Sing Matoon, S. D. A. Rep. Vol. IV. p. 259.

4. Baillie, 8. *Futawa Alumgiree* : an executor sold land to pay a debt of the deceased with its price having property in his hands sufficient to the discharge of the debts : this sale was lawful. *Hedaya*, Vol. IV. p. 553. See also Nundkoomar Roy *versus* Ranee Hary Priya, S. D. A. Rep. Vol. V. p. 233, that a sale of lands by order of the Court of Wards is valid ; if unnecessarily sold, the sale is still legal, but the Court is responsible for all losses.

5. *Hedaya*, Vol. IV. pp. 540, 542.

ON THE RIGHTS AND OBLIGATIONS OF THE REPRESENTATIVES OF A DECEASED PERSON.

Rights and obligations of the deceased devolve upon the executors or heirs under Mahomedan Law.

The estate of a deceased Mussulman devolves upon his executor, or, if none has been appointed, upon his heirs, who are considered to have accepted it, if they interfere with the estate. See Sect. 57. (Sect. 234.)

The heir may renounce the inheritance.

But not before the inheritor's death.

The heir is not legally bound to accept the inheritance; he may renounce it wholly or partly, but according to Mahomedan Law, he cannot renounce or transfer his inheritance *before* the inheritor's death, as the right was not in existence at that time, and even if a consideration has been paid, it is invalid.[1] (Sect. 237.)

Obligation of heirs.

Payment of funeral expenses.

The first duty of the executor or heirs is to see the funeral of the deceased performed suitably to his rank; the expense of it is payable out of the estate before all other debts.[2] (Sect. 243.)

Whether the debt was contracted at an earlier or later period, or whether it was in writing or verbal, makes no difference.[3] (Sect. 245.)

A debt incurred during health is, accordig to Mahomedan Law, preferred to one of which there is no other evidence than the acknowledgment of the deceased on his death bed.[4] (Sect. 245.)

Debts when to be paid.

The executor, or the heirs, are bound to pay the debts of the deceased before making any division of the property.[5] (Sect. 247.)

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1. Princ. Mahomedan Law, p. 90. S. D. A. Rep. Vol. IV. p. 213.
2. *Sirajiyyah.* Baillie, p. 1.
3. *Sirajiyyah.* Princ. Mahomedan Law, p. 345. Baillie, p. 2.
4. *Hedaya,* Vol. III. p. 163.
5. *Hedaya,* Vol. III. p. 209, Vol. IV, p. 30.

All debts are due on the death of the debtor.

All debts fall due *at the time of the debtor's death*, even if postponement of payment had been granted to the deceased; thus, if money was borrowed on the condition of being paid a year after, and the debtor dies two months after having borrowed the money, the money must be paid immediately on his death; or, if it was agreed that the debt should be paid by instalments, the whole debt will still be due on his death, because the postponement was *a personal* right of the debtor, which expires with him.[1] (Sect. 249.)

Debts unpaid on partition.

The creditors should therefore demand payment *immediately* on the death of the debtor, and if they allow the estate to be divided, and the debt *was unknown* to the executor and heirs, it is equitable, that the heir should only be made responsible in proportion to their respective shares, and that the one should not be responsible for the other.[2] (Sect. 250.)

Husband, Wife, Father and Mother not generally liable.

No other person than the executors, or the heirs of the deceased, is responsible for his debts,[3] and though the Head of the family is responsible for all debts incurred by the different members for their support,[4] yet, the husband is not generally responsible for the debts of his wife,[5] nor the wife for the debts of her husband.[6] (Sect. 254.)

1. Jowhurruh-oon-Nuyyerah. Baillie, Appendix 8, (See also Sect. 247, Note l).

2. Yet this is doubtful. If a debt be proved against the Estate after partition, it is the rule according to Mahomedan Law, that the partition is invalid.—*Hedaya*, Vol. IV. p. 30., each heir seems therefore liable to return what he has received.

3. *Hedaya*, Vol. IV. p. 30. Princ. Mahomedan Law, p. 88.

4. *Hedaya*, Vol. I. p. 397; Vol. II. p. 628.

5. Princ. Mahomedan Law, pp. 57,154.

6. Noor Jehan Begum *versus* Pran Sukh, S. D. A. Rep. Vol. IV. p. 161.

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